Chapter I
Asylum law: Structure of International Standards

A. The Legal Framework of the System for International protection in Europe

The phenomenon of individuals seeking asylum in another State is a consequence of the failure of States of origin to comply with their obligation to protect their citizens from prohibited treatment. This situation can arise both when the State is itself perpetrating the ill-treatment or when the State is unable or unwilling to protect its citizens from acts of ill-treatment coming from non-state agents. Ill-treatment perpetrated by the State, or with its acquiescence, or its failure to protect sometimes leads to a situation so severe that its citizens are compelled to leave their homes, and often their families, to seek protection (asylum) in a different country. They are thus known as 'asylum seekers'. When this happens and the person fleeing that ill-treatment does so on grounds recognized as legitimate by the relevant international standards, that individual qualifies for international protection ('asylum') and in particular from return to the country of origin. These people are then granted some form of asylum in the country that receives them. There are several different forms of 'asylum' in Europe, which are explained below.

States are prohibited by international law to exclude their own citizens from their territory,[1] but a key attribute of sovereignty is the general right to exclude from a State's territory those who are *not* the State's own citizens.[2] States are however under an obligation to protect individuals seeking asylum who have a well-founded protection claim. This internationally mandated legal duty towards those in need of international protection thus significantly interferes with one of the key attributes of State sovereignty.[3]

Short Overview of the Framework of rights regulating the situation of Asylum Seekers and people in need of International protection in Europe

Three overlapping regimes govern international protection in Europe:

- **a.** At global level, the United Nations (UN) instrument constituting the cornerstone for the protection of asylum seekers is the **1951 Geneva Convention Relating to the Status of Refugees**[4] (hereinafter also referred to as 'GC', and its **1967 Protocol**, which removed the restrictions that limited the circumstances of persecution to 'events in Europe' and to 'events occurring before 1 January 1951').[5]
- **b.** At regional level, the **European Convention on Human Rights (ECHR)**,[6] although not an instrument with specific provisions for asylum seekers, provides important safeguards to migrants and asylum seekers who fall within the jurisdiction of States that are Members of the Council of Europe (CoE). Other Council of Europe instruments are also relevant to the protection of this category (see section B of this chapter).
- **c.** At **European Union (EU)** level, the situation of asylum seekers in the EU is comprehensively governed through the so-called EU asylum *acquis* (or Common European Asylum System, hereinafter also referred to as 'CEAS'), i.e. the body of law consisting of the Regulations and Directives dealing with the various aspects of the issue. A more detailed analysis of these instruments will be provided in the following sections. The asylum *acquis* applies – with some

[1] OHCHR Discussion paper, Expulsions of aliens in international human rights law, Geneva, September 2006, p.1
[2] *Ibid*
[3] UN High Commissioner for Refugees (UNHCR), Refugee Protection: A Guide to International Refugee Law, 1 December 2001, available at: http://www.refworld.org/docid/3cd6a8444.html [accessed 11 October 2017]
[4] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: http://www.refworld.org/docid/3be01b964.html [accessed 11 October 2017]
[5] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: http://www.refworld.org/docid/3ae6b3ae4.html [accessed 11 October 2017]
[6] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html

notable exceptions –[7] to all EU Member States (EU 'MS') and to those non-EU Member States, which have entered into agreements with the EU to participate in some parts of the asylum *acquis*.[8]

Migration flows have commonly been a mixture of asylum seekers fleeing the situations of persecution identified in the Geneva Convention (GC), other categories of asylum seekers and individuals entitled to International protection for being at risk of ill-treatment in their country of origin or return (Beneficiaries of International protection – also BIP) and migrants who leave their countries for reasons not recognized as entitling them to International protection. States have obligations – but different obligations – towards all three groups. The duties owed to asylum seekers are more exigent, and a requirement for compliance with these duties is that those in need of international protection are properly identified as such. On the other hand, while those migrants who do not meet the requirement for international protection are not entitled to the same level of protection as those who do, they must nonetheless be treated with dignity and in accordance with the applicable norms of International Law.

With the "migration crisis" of 2015 and the closure of the so-called Balkans route, displacement trends have witnessed a comprehensive evolution. In 2015 the numbers of migrants *en route* to Europe reached a peak, leading the media to refer to the phenomenon coining the term 'Refugee Crisis'. In March 2016, the situation reached an abrupt shift with the signing on the side of the EU of the so-called 'EU-Turkey statement',[9] under which migrants reaching Greece after the date of the deal's signature were to be returned to Turkey under the agreement which claimed that they would be treated with comparable standards of protection in that country. The signature of the agreement, together with the closing of the Balkans migratory route, led to a sharp decrease in asylum seekers numbers, which – for Serbia alone – dropped at 4.146 in October 2017.[10]
Although being initially accompanied by an immediate decrease in the number of asylum seekers reaching Europe,[11] the above changes have not fundamentally changed the new dynamics and characteristics of migration movements, which continue to interest increasingly larger sections of the populations involved. Together with a substantial change in the numbers of people moving, the migratory routes themselves have become more and more dangerous and intricate. This is both due to issues on the ground, such as the growing use of unseaworthy vessels in migration by sea and the increasingly common recourse to criminal networks to facilitate movements, and to the widespread creation of bureaucratic and procedural constrains to limit secondary movements and an increase in the summary rejection of asylum claims for being unfounded or abusive.[12]

These trends have led to a profound metamorphosis of migration influxes, calling for a rethinking of the features and needs of people on the move. The magnitude and frequency of mass movements has become an common reality, making the individualised assessment of claims required by international law increasingly more costly and, it is argued by some, unsustainable.[13]

---

[7] The UK, Ireland and Denmark have a particular status *vis a vis* some of the instruments.
[8] For instance, Norway, Iceland, Liechtenstein, and Switzerland are part of the Dublin system.
[9] EU-Turkey statement, 18 March 2016, available at: www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/#
[10] European Civil Protection and Humanitarian Aid Operations, Factsheet on Serbia, last updated on 9 October 2017, available at: http://ec.europa.eu/echo/files/aid/countries/factsheets/serbia_en.pdf
[11] Background Information: EU-Turkey Statement – One year on, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf
[12] See for instance, International Organisation for Migration (IOM), Global Migration Data Analysis Centre, Dangerous journeys – International migration increasingly unsafe in 2016, ISSN 2415-1653 | Issue No. 4, August 2016, available at: https://publications.iom.int/system/files/gmdac_data_briefing_series_issue4.pdf
[13] Kay Hailbronner, *Temporary and Local Responses to Forced Migrations: A Comment*, 35 VA. J. INTI'LL 81 (1994), p. 92-93, observing how the Convention is "*not fit to cope with large refugee movements*".

More importantly, forced migration is described as more often '*driven by violence lacking a persecutory focus*'[14] required by the qualifying grounds under the traditional Geneva Convention (see below). This change contributed to make the distinction between 'refugees' and people in need of international protection and other migrants increasingly blurrier,[15] putting to the test the continued validity of a strict application of the GC criteria.

However, while the reality of migration influxes has changed, the GC maintains its focus on the group originally identified through the elements of its definition. In so doing, the Convention has maintained a division between those whose protection claims meet the criteria (**Convention Refugees**) and those whose claims for protection are not in line with the terms of the Convention, and the third group – other migrants – who often end up being labelled as '**economic migrants'** and who are thus prevented from accessing forms of protection comparable to those provided under the GC. As a consequence, it has been observed that *'[t]he Geneva Convention remains effective – and essential – as an instrument which provides additional benefits to an increasingly small number of people who are recognised as falling within its ambit by governments,'*[16] with the significant limit that those whose protection claims are not based on a Convention ground remain formally outside of its scope.[17]

As far as Europe is concerned, the GC does not constitute the sole framework providing rights and protection to asylum seekers and people in need of international protection. Its provisions must be read in conjunction with two more legal regimes: the system provided by **the Council of Europe,** with special reference to the **European Convention of Human Rights** and the **EU CEAS,** the comprehensive legislative framework governing the different aspects of Asylum and International protection. Some of the rights and guarantees stemming from these three regimes are specifically designed to protect refugees and migrants, while other belong to the broader realm of Human Rights standards applying to all individuals irrespective of their migration status.

Although to a certain extent their provisions mirror and overlap with the standards of the GC, these regimes have significantly developed and evolved the scope of the rights provided at the international level.[18] The following sections will provide an overview of the main characteristics and guarantees set under each framework, highlighting for each the main strengths and limits and providing insights from their relevant case law.

B. The International level – The 1951 Geneva Convention Relating to the Status of Refugees and the 1967 Protocol

The instrument that first articulated the very definition of who is a 'refugee' at the international level is the 1951 Geneva Convention relating to the Status of Refugees (GC), adopted by the UN after World War II (WWII) to provide a legal regime regulating the status of all the hundreds of thousands of refugees who were displaced in Europe in 1951. Due to the historical circumstances in which it was adopted, the GC contained a geographical and temporal limitation to the scope of its application, limiting the effects of its protection to refugees coming from Europe and fleeing the events unfolding before 1951. In order to address the mutated historical circumstances and extend the protection of the Convention to refugees

[14] Fitzpatrick, Joan. *Is the 1951 Convention Relating to the Status of Refugees Obsolete*?, Immigration Admissions: The Search for Workable Policies in Germany and the United States 3 (1997), p. 205-26.

[15] UN High Commissioner for Refugees (UNHCR), UNHCR, Refugee Protection and International Migration, 17 January 2007, Rev.1, §8 and 16, available at: http://www.refworld.org/docid/462f6d982.html

[16] Mole, Nuala; Meredith, Catherine, Council of Europe, Human rights files, No. 9: Asylum and the European Convention on Human Rights, 15 December 2011, p.11, available at: http://www.refworld.org/docid/4ee9b0972.html]

[17] *Ibid*, p.11

[18] Mole, Nuala; Meredith, Catherine, Asylum and the European Convention on Human Rights, p.11: "The new EU regime set up under the Common European Asylum System (CEAS) fills some of these lacunae but still fails to apply to all those who are recognised by the European Court of Human Rights as being in need of – and entitled to – international protection".

whose protection needs emerged from situations unrelated to the aftermath of WWII and subsequent to 1951 a Protocol was adopted.[19] The Protocol entered into force on 4 October 1967.
The UNHCR Guidelines specify that, although functionally linked to the Convention, the Protocol remains an 'independent instrument, accession to which is not limited to States Parties to the Convention'.[20] The Protocol had the objective to allow the Contracting States to the Convention to specify the extent of their obligations under the Convention[21]. The Protocol gives States the possibility 'at the time of signature, ratification or accession', to make a declaration in relation to the meaning of Art. 1(B), specifying whether they wished to maintain or remove the geographical limitation originally limiting the scope of the Convention to events occurred in Europe.[22] As far as Europe is concerned, only Turkey currently maintains the geographical limitation. Serbia acceded both the GC and the Protocol on 12 Mar 2001.
At the substantive level, the GC provides (i) the definition of the constituting features of refugees, (ii) a comprehensive set of rights and obligations applying to refugees as well as (iii) the obligations applying to Contracting States hosting them.

It is important to recall that the determination of the status of 'refugee' is a '**declaratory'** one and not a '**constitutive'** one.[23] This means that *de facto* '[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition',[24] irrespective of his formal determination as such. The facts giving rise to the protection needs will in fact occur at a time prior to when the 'status is formally determined'.[25] Whether or not he/she will be recognized as such by the receiving state and granted protection is a separate issue and depends on the outcome of a formal process of asylum status determination, which is aimed at acknowledging the existence of this status.
The general definition of a 'refugee' is given under Art. 1A(2) of the GC (as modified by the 1967 Protocol). A refugee is defined as a person: '*who owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,* ***is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.***

Despite this, upon meeting the above and other statutory criteria, individuals seeking protection under the provisions of the GC are said to be seeking 'asylum' and, if their needs are recognised, they will be will be properly called refugees. The GC 'does not prescribe a particular procedure for the determination of whether a person is a refugee' but mandates that 'any procedures must be fair and efficient' and a requires States to establish a 'central authority with the relevant knowledge and expertise to assess applications, ensure procedural safeguards are available at all stages of the process and permit appeals or reviews of initial decisions'. The GC is *prima facie* opposed to attributing the qualification of refugee solely based on the finding of characteristics regarded as indicators of persecution and without an individualized assessment of the situation. Although this often leads to the same result obtained through group assessment – as people fleeing the same situation of persecution will commonly share equally founded protection claims – the **individualised assessment** remains the GC's 'preferred approach'.[26]

---

[19] UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3, §8 available at: http://www.refworld.org/docid/4f33c8d92.html

[20] *Ibid* §9.

[21] UNHCR, United Nations High Commissioner for Refugees, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol (As of April 2015), available at: http://www.unhcr.org/uk/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html

[22] *Ibid* The Protocol provides the possibility for States to interpret Art. 1(B) to mean (a) or (b), as follows: (a) 'events occurring in Europe before 1 January 1951' [….] (b)'events occurring in Europe or elsewhere before 1 January 1951'.

[23] Hathaway, James C. The rights of refugees under international law, Cambridge University Press, 2005, p.184

[24] UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3, §28: 'Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee'.

[25] Ibid §29

[26] For the whole paragraph see UNHCR publication on the 1951 Convention and its 1967 Protocol, p.7 at: http://www.unhcr.org/4ec262df9.pdf

❖ **The 'Well-founded fear of being persecuted'**

Based on the approach taken by the GC, the quality of 'refugee' is dependent on the existence of a '**well-founded fear' of persecution**. As observed by the UNHCR, the choice to rely on the person's individual fear marks the Convention's intention to move away from earlier methods to assess the validity of refugees' claims, often based on 'the situation prevailing in his country of origin' rather than on the individual circumstances.[27]
In order to give ground to an asylum claim, the subjective 'fear' considered by the Convention must possess further characteristics, namely it must contain an **objective and a subjective element.** This requires that the fear must both **i.** appear as an emotional state of the asylum seeker and **ii.** It must be reflected by facts and 'supported by an objective situation'.[28]

The subjective element: as the subjective evaluation of the fear 'is inseparable from an assessment of the personality of the applicant',[29] decision-makers should keep in mind that different people react differently to situations that seem comparable.[30] In this sense, the visibility or strength of the person's emotional state or reactions – or lack thereof – should not be taken as measure of their credibility or of well foundedness of their claim. For the assessment to have a subjective dimension, together with the 5 statutory grounds of persecution (which will be examined below), the decision makers should take into account the asylum seeker's '*personal and family background […] his own interpretation of his situation, and his personal experiences'*.[31]

The expression of protection needs: it should be borne in mind that refugees will normally not express their protection needs using the terms used in the GC (expressly mentioning a fear of persecution) therefore decision makers must be careful in deducing whether the situation falls under the GC definition judging the merits of the asylum claim and not just the formal aspects of the claim.[32]

The objective element: As mentioned above, the existence of a subjective fear of prosecution is necessary but not sufficient to make an asylum claim valid and must be corroborated by the existence of elements of facts which may both relate to the person's direct or indirect individual experience or to the conditions of the country of origin more generally. The UNHCR guidelines explicitly mention the following as elements that may substantiate a risk of persecution:

- Episodes of persecution affecting the asylum seeker's 'friends and relatives and other members of the same racial or social group'[33]
- The existence of certain laws and their application in the country[34]
- Situations leading to the displacement of 'entire groups', members of which 'could be considered individually as refugees'[35] ('group determination' of refugee status).
- Evidence of previous persecution (in GC terms) suffered by the asylum seeker[36]
- Possession of a Passport from the country of origin at the moment of the application shall not be regarded as a conclusive indication that the asylum claim is unfounded or that the alleged fear is not well-founded.[37]

❖ **Qualifying acts of Persecution under the GC and actors of persecution**

[27] UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, above, §37
[28] Ibid §38
[29] Ibid §40
[30] Ibid §40
[31] Ibid §41
[32] Ibid §46
[33] ibid §42
[34] Ibid §43
[35] Ibid §44
[36] Ibid §45
[37] Ibid §47-48

The GC and UNHCR guidelines identify '**a threat to life or freedom**' based on the 5 grounds in the definition as an unequivocal form of persecution. However, based on their severity, '*other serious violations of human rights',*[38] can be equally capable to meet the definition, depending on the individual circumstances of the case. Persecution can arise both from one single act of persecution, of sufficient severity to give rise to the fear by itself, or from the combined effect of '**various measures not in themselves amounting to persecution'**, considered by themselves or in combination with '**other adverse factors**'.[39]

Persecution can be the consequence of both acts of the **State authorities** and acts of **'sections of the population'** (non-State actors) that are '*knowingly tolerated by the authorities'* or in relation to which the authorities *'refuse, or prove unable, to offer effective protection'.*[40]
In specific circumstances, the following constitute acts potentially amount to persecution:

- Discrimination – not all acts characterised by a disparity of treatment will amount to discriminations liable to be considered of a persecutory nature. Only when the difference in treatment is of 'substantially prejudicial nature for the person concerned' discrimination can be considered to constitute persecution.[41].Stronger grounds exist when the acts of discrimination are numerous and the effect is considered cumulatively.[42]
- Punishment – Sanctions and punishments provided as consequences of common law offences do not normally amount to persecution.[43] Important exceptions however exist if: **i.** the punishment itself can be considered '**excessive**'; [44] **ii**. The punishment is based on the applicant's characteristics under the 5 grounds of the GC;[45] **iii.** If it is provided by laws that are contrary to Human Rights; **iv.** If the application of the law is discriminatory.[46]
- Exclusion clauses: Some crimes however are of such gravity that their commission by a refugee may trigger an exclusion clause (discussed in detail below).[47]

The **5 grounds** of persecution will now be analysed in detail, keeping in mind that more than one reason for persecution can exist in one case and elements of the following grounds can overlap.[48]
It is also important to note that for the purposes of assigning the refugee status it is both relevant that the asylum seeker identifies itself with one or more of the characteristics underlying the 5 grounds and that he/she is identified as being part of a group targeted on reasons of these characteristics by the actors of persecution, irrespective of whether such identification is founded or not.

❖ Race

Persecution based on race is understood extensively as including 'all kinds of ethnic groups that are referred to as "races" in common usage'.[49] Due to its historical significance, this ground of persecution is considered to be uncontroversial.[50] As a rule, discrimination based on race will be significant to granting refugee status if the act/s considered as such that as a result '*a person's human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences'*. In certain cases, the mere belonging to a

[38] Ibid §51
[39] Ibid §53 (e.g. general atmosphere of insecurity in the country of origin)
[40] Ibid §65
[41] Ibid §54 – (e.g. 'serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities').
[42] Ibid
[43] Ibid §55
[44] Ibid §57
[45] Ibid §57
[46] Ibid §59
[47] Ibid §58
[48] Ibid §67
[49] Ibid §68
[50] Ibid § 68

certain racial group will be 'in itself be sufficient ground to fear persecution' on account of the particular circumstances affecting it.[51]

❖ **Religion**

Persecution based on religion includes acts aimed at violating or hindering a person's '*right to freedom of thought, conscience and religion*' including that '*to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance*'.[52] Importantly, this right was observed to include '*holding or refusing to hold any form of theistic, non- theistic or atheistic belief*'.[53] Several acts are liable to violate this right:

- The '*prohibition of membership of a religious community, of worship in private or in public, of religious instruction*'[54]
- *Serious measures of discrimination* linked to the practice of a certain religion or to belonging to a religious community.[55]
- The right to religious freedom and the exercise of conscientious objection.[56]

As already observed in relation to race, membership (real or alleged) to a religion is not in itself sufficient to warrant a claim of persecution without submission of further elements, save in circumstances where the issues affecting the particular religious group are such that persecution can be inferred without need to prove further elements.

The UNHCR Guidelines on Religion-Based claims define the meaning of religion for the purposes of the GC as tripartite, identifying religion as: **belief** (including non-belief); as **identity**; as a **'way of life'**.[57] While religion as belief has already been examined above, religious as identity is described as the broader sense of belonging or identification to 'a *community that observes or is bound together by common beliefs, rituals, traditions, ethnicity, nationality, or ancestry*'.[58] Finally, manifestations of religion as a 'a way of life' are understood to include the '*wearing of distinctive clothing or observance of particular religious practices, including observing religious holidays or dietary requirements*'.[59]

As mentioned at the beginning of this section, the authenticity of the religious feelings or practices at stake is not decisive insofar as the **actor of persecution attributes them to the asylum seeker and he/she is at risk as a consequence**.[60] Accordingly, procedurally speaking, and provided that the latter is the case, the asylum seeker should not necessarily be expected to '*know or understand anything about the religion*'.[61]

Gender and religious practices:[62] where a certain religion assigns particular roles or conducts to a group, for instance women, and a punishment is imposed for non compliance, this can be '*evidence that a woman holds unacceptable religious opinions regardless of what she actually believes*'.[63]

---

[51] Ibid §70

[52] Ibid §71

[53] Hathaway, James C. "Refugees and asylum." (2012), p.187.

[54] Ibid §72

[55] Ibid §72

[56] UN High Commissioner for Refugees (UNHCR), Guidelines on International protection No. 6: Religion-Based Refugee Claims under Art. 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 28 April 2004, HCR/GIP/04/06, §25, available at: http://www.refworld.org/docid/4090f9794.html

[57] Ibid §5

[58] Ibid §7

[59] Ibid §8

[60] Ibid §9

[61] Ibid §9

[62] Ibid §24: Practices linked to gender include '*Clothing requirements, restrictions on movement, harmful traditional practices, or unequal or discriminatory treatment […] in some countries, young girls are pledged in the name of religion to perform traditional slave duties or to provide sexual services to the clergy or other men [,] forced into underage marriages, punished for honour crimes in the name of religion, or subjected to forced genital mutilation for religious reasons. […] Women are still identified as "witches" in some communities and burned or stoned to death […] in addition, individuals may be persecuted because of their marriage or relationship to someone of a different religion than their own*'.

[63] UN High Commissioner for Refugees (UNHCR), Guidelines on International protection No. 1: Gender-Related Persecution Within the Context of Art. 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, available at: http://www.refworld.org/docid/3d36f1c64.html, §25

❖ **Nationality**

At the GC level, the concept of nationality is interpreted as covering both 'citizenship and 'membership of an ethnic or linguistic group'.[64] This ground of persecution is considered prone to overlap with other Convention grounds, such as political opinion or race, especially in *situations of 'co-existence within the boundaries of a State of two or more national (ethnic, linguistic) groups'*[65] *or where specific political groups are 'identified with a specific 'nationality''.*[66] *Belonging to a minority or majority group is not conclusive to the fear of persecution being well-founded or not, as both situations of persecution by a dominant majority and by minorities are possible – although the latter are more rare*.[67]

In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.[68]

❖ **Membership of a particular social group**

This ground of persecution is considered to apply to people of '*similar background, habits or social status*' […] *who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society'*. The wide pool of subjects identifiable through this definition had made it liable to be the most prone to be interpreted extensively by international practice, academia and case law.

Gender, Sexual orientation and membership to a particular social group: The description of the characteristics shared by the group as '*innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights'*[69] has attracted under this category claims based on sexual orientation, identity or gender. Due to the original approach taken by the Convention, the disadvantaged situation of women and homosexuals in some contexts had in fact gone 'unrecognised'.[70] Although gender and sexual orientation do not constitute autonomous grounds for claiming asylum, it is accepted that they can underlie certain acts of persecution.

The increased acceptance of these factors as substantiating persecutory acts was driven by international law characterisation of acts '*such as sexual violence …as serious abuses, amounting to persecution*'.[71] In light of the definition of social group under the GC relying on *inter alia* such characteristics that are of **'fundamental'/'innate'** nature, persecution based on gender/sex-related issues are deemed to duly fall under the social group remit.[72]

❖ **Political Opinion**

Finally, as regards persecution on grounds of the person's political opinion, some of the considerations made for the other grounds of persecution must be restated. Specifically, holding a different political opinion than the one of the majority in rule in the country will not *per se* constitute a reason of persecution.[73] The asylum seeker must hold or be considered to hold a political opinion that is not tolerated by the government and such opinion must have come to the knowledge of the authorities. The UNHCR has noted that the relation of casualty for persecutory acts under this category is not always direct, i.e. the person will not be directly sanctioned for his/her opinions but rather for 'alleged criminal acts against the ruling power' or other acts[74] so it is decisive that the acts suffered by the asylum seeker can be

---

[64] UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, above, §74
[65] Ibid §75
[66] Ibid §75
[67] Ibid §76
[68] Art. 1 A (2), paragraph 2, of the GC
[69] UN High Commissioner for Refugees (UNHCR), Guidelines on International protection No. 1: Gender-Related Persecution Within the Context of Art. 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, §29, available at: http://www.refworld.org/docid/3d36f1c64.htm
[70] Ibid §5
[71] Ibid §9
[72] Ibid §30
[73] UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, above, §80
[74] Ibid §81

traced back to his/her political views.[75] It should be noted that in some cases, where the views of the person concerned are considered of sufficient strength, it will be possible to infer that he/she has a well founded fear of persecution even when no persecution has occurred yet, but it can reasonably be assumed that it could occur soon.[76]

Prosecution for political opinions or politically motivated acts: where under this category persecution takes the form of prosecution, it must be ascertained whether the prosecution is for a punishable act committed out of political motives and the anticipated punishment is in conformity with the law of the country[77] the person subjected to it will not be entitled to claim protection under the GC, however if the prosecution or incrimination of the person is used as 'a pretext for punishing the offender for his political opinions or the expression thereof' or where the punishment risked is 'excessive or arbitrary' the situation may amount to persecution.[78]

- **Exclusion and Cessation Clauses**

Upon the occurrence of certain events or when certain conditions are met, the GC recognises that the status of refugee should cease for particular individuals, as they are no longer necessary on account of his/her personal circumstances or on account of the circumstances in the country of return. Where 'exclusion reasons' exist, although the criteria for being recognised as a refugee are met by the individual, her/she should be excluded by this status on account of his/her personal conduct.

These cases are regulated under Art. 1(C) (Cessation clauses) and Art. 1(F) (Exclusion clauses).

Art. 1(C) Cessation clauses regulate the circumstances under which the refugee status can be terminated. They are formulated and interpreted in a manner such that the changes considered liable to warrant such cessation must be of a non-temporary nature and of a fundamental character, so as to give stability to the status of refugee.[79] Also, they are in closed number and cannot be interpreted extensively or by analogy.

These are the circumstances where the protection of the GC ceases to apply to a refugee:

> *' (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or*
> *(2) Having lost his nationality, he has voluntarily re-acquired it; or*
> *(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or*
> *(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or*
> *(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under Section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;*
> *(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;*
> *Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.'*

Art. 1(F) (Exclusion clauses) specifies that a person **can** be excluded from refugee status if:

A. *He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
B. *He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*

[75] Ibid §81
[76] Ibid §82
[77] Ibid §84
[78] Ibid §85
[79] Ibid §112

C. He has been guilty of acts contrary to the purposes and principles of the United Nations.

Under the above, the seriousness of the acts committed by the refugee is considered such that the State's obligation to provide protection to them as refugees is outweighed by its legitimate interest to exclude them from its territory on safety considerations.

Although the application of the above clauses of cessation or exclusion does prevent the refugee from being protected in line with the terms of the GC and from the *non-refoulement*[80] obligation as provided therein, it does not exempt the State to provide protection to him or her by virtue of broader human rights obligations stemming from other instruments of international law.
The scope of the *non-refoulement* principle under the GC and under the other instruments of International and European law will be analysed in detail in the following sections. At this stage it is however worth outlining that, while the *non-refoulement* obligation under the GC is more limited in scope and only applies to those qualifying as GC refugees, under International Law a broader prohibition of *refoulement* emerges in turn from:

- Art. 6 and 7 of the International Covenant on Civil and political rights, in light of which States are required to refrain from *refoulement* not only in the case provided for under the Geneva convention, but also where '*there are substantial grounds for believing that there is a real risk of irreparable harm*' within the meaning of the ICCPR provisions.
- Art. 2 and 3 of the ECHR – which respectively provide for the rights to life and for a general prohibition of torture and inhuman or degrading treatment or punishment, which has been interpreted to apply to cases of return of aliens.[81]
- Art. 4 of the Charter of Fundamental Rights of the EU, corresponding to Art.3 ECHR (above).

Two main aspects covered by the GC and the Protocol should be kept in mind:
(1) Art. 1: the basic refugee definition, including the list of qualifying reasons for the feared persecution; the circumstances in which people are ineligible for refugee status, or cease to be regarded as refugees (Art. 1C).
(2) Art. 2 to 33: the legal status of refugees in their country of asylum, their rights and obligations – including pre-eminently the right in Art. 33(1) to be protected from forced return, *'refoulement'*, to a territory where their lives or freedom would be threatened. As noted above, some people at risk of persecution are excluded from refugee status (Art.1F). But even those who are eligible for and have acquired refugee status can lose the protection from *refoulement* under the GC if their conduct is seen as a threat to the host country. In this regard Art. 33(2) states:
The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

- **States' obligations towards refugees:**

States' obligations to refugees include ensuring the implementation and observation of their entitlement to the many social and civil rights set out in the GC. Art. 34 of the GC also provides for assimilation and naturalisation:

> *'The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings'.*

- **The Role of the UNHCR**

[80] Under the GC, the principle of *non-refoulment* establishes the prohibition to return Convention refugees or asylum seekers to their country of origin or habitual residence or to a country where they risk facing harm.
[81] See among other Chahal v. United Kingdom

States also have an obligation to cooperate with the United Nations High Commissioner for Refugees (UNHCR) in the exercise of its functions, and facilitating its duty of supervising the implementation of the GC's provision.
There are several guidelines for the procedures and criteria to be applied to the determination of refugee status. The UNHCR has published a handbook,[82] and sets out guidance in the Conclusions of its Executive Committee or in other guidelines.[83]

- **Monitoring Body**

There is no supranational body providing review, particularly not judicial review, of national decisions on application and implementation of decisions under GC. Therefore there is a lack of legal certainty between different national decisions. Those refused refugee status at national level have no recourse to international review body/court to review decision. The GC, unlike some other UN instruments, has no optional right of individual petition to an overseeing committee. However, guidance on the interpretation of the GC is released in the form of policy documents from the Executive Committee of the UNHCR.[84] International jurisprudence has also dealt with questions of interpretation of the GC, and leading academics have offered their opinions on interpretation.[85]

C. General aspects of the ECHR

The European Convention of Human Rights constitutes one of the earliest regional human rights frameworks setting standards and promoting the protection of fundamental individual rights and freedoms in almost the entirety of geographical Europe.[86] The ECHR was opened for accession in on 4 November 1950 and entered into force on 3 September 1953 upon reaching 10 ratifications.[87]
The ECHR is undoubtedly the largest subscribed instrument adopted by the Council of Europe as well as the one providing for the most effective enforcement and monitoring mechanisms for States' compliance, which makes it a fundamental institution for the protection of human rights in the European region.[88]
There are presently 47 parties to the ECHR.
The ECHR allows for both a right to **individual (Art. 34) and inter-State petitions (Art. 33)**, thereby providing two important routes to claim violations of rights before the Court. The right to individual petition, in particular, is recognized upon both private individuals as well as '*non-governmental organisation or group of individuals'* as legitimate stakeholders.
Petitions to the ECtHR can be brought against one ore more of the States Parties to the ECHR allegedly interested by the violation complained. Depending on the circumstances of the application, there can be

[82] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992.
[83] See, for instance, the UNHCR Policy Document 'Policy Framework and Implementation Strategy: UNHCR's role in support of an enhanced inter-agency response to the protection of internally displaced persons, 4 June, 2007', available at http://www.unhcr.org/46641fff2.html [accessed 11 October 2017]
[84] See examples of UNHCR Executive Committee policy documents at http://www.unhcr.org/uk/idps-policy-guiding-documents.html [accessed 11 October 2017]
[85] See: the commentary of Professor Atle Grahl-Madsen on the Convention at http://www.unhcr.org/3d4ab5fb9.pdf [accessed 11 October 2017]; Goodwin-Gill, Guy S., and Jane McAdam. The refugee in international law. Oxford University Press, 2007; Hathaway, James C. The rights of refugees under international law. Cambridge University Press, 2005; Lauterpacht, Elihu, and Daniel Bethlehem. "The scope and content of the principle of non-refoulement: Opinion." Refugee protection in international law: UNHCR's global consultations on international protection (2003): 87-177.
[86] The Convention primarily focuses on civil and political rights while 'economic, social and cultural rights [are] protected under the European Social Charter and/or the International Covenant on Economic, Social and Cultural Rights", see: CoE - The position of aliens in relation to the European Convention on Human Rights , p.11 cross citing §20: Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights (1995), at 3.
[87] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005
[88] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005

limits to the violations that can be complained based on the existence, on the part of the state, at a certain time, **of derogations from specific obligations** under the ECHR.[89]

Under Art. 15, the ECHR makes it possible for contracting parties to derogate from some of their obligations in time of 'war or *other public emergency threatening the life of the nation'*. As they constitute an exception from State's key commitments under the ECHR, such measures '*are only allowed to the extent strictly required by the exigencies of the situation'* and, in order to be valid, they must not be '*inconsistent with [the State's] other obligations under international law*'.
In view of their fundamental nature, however, some of the rights and freedoms protected by the ECHR do not tolerate derogation even in the circumstances described above. These rights include the **right to Life (Art. 2)**[90], the **prohibition of inhuman or degrading treatment or punishment (Art. 3)**, the **prohibition of slavery and servitude (Art. 4(1))** and the **principle of 'no punishment without law' (Art. 7).**[91]

To ensure the collective enforcement of the ECHR, the CoE has established a judicial body responsible to monitor States' compliance and sanction violations of the rights and freedoms: the European Court of Human Rights (ECtHR). In its current set-up, the Court's structure builds upon and expands the mandate of two pre-existing institutions (a part-time European Court and Commission of Human Rights, set up in 1954 and 1959 respectively).[92] The creation of the Court through the conflation of the two institutions was implemented in 1998 through the adoption of Protocol No.11.[93] The ECtHR jurisdiction currently applies to all 47 State Parties to the CoE.
The ECtHR's judicial functions are complemented and strengthened by the follow-up action of the **Committee of Ministers of the CoE**,[94] a body bringing together the Ministers for Foreign Affairs of the Council's MS, instructed with the task of supervising the implementation of the ECtHR judgments by Contracting States. The work of the Court and of the Committee of Ministers can be followed on HUDOC.[95]

1. The protection of Asylum Seekers within the ECHR: Some preliminary remarks

Although providing important safeguards applying in the context of migration as well as specific references to the rights of aliens, the ECHR does not contain any provisions which expressly protect asylum seekers or recognise the special position of refugees.[96] Some subsequent Protocols[97] expanded the scope of the ECHR are relevant to migration. The ECtHR has additionally no jurisdiction to rule whether a person has rightly or wrongly been refused recognition as a Geneva Convention refugee (see: ***Ahmed v. Austria***).

The ECHR makes it possible for any individual (not only citizens of the contracting States) to rely on the protection of rights attributable to the action or inaction of a Contracting State, **irrespective of the applicant's nationality or migration status**. This feature makes the protection of the ECHR available in practice to migrants and asylum-seekers.
The ECHR and Court's jurisprudence have undoubtedly considered the States' right to admit or exclude foreigners from their territories as a 'key *attribute of State sovereignty*'[98] while, as a corollary to this

[89] Art. 15 - Derogation in time of emergency: 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Art. 2, except in respect of deaths resulting from lawful acts of war, or from Art. 3, 4 (paragraph 1) and 7 shall be made under this provision. 3. […]
[90] Unless it is violated as a result of 'lawful acts of war' – Art15.2
[91] Art.15.2
[92] https://www.coe.int/en/web/tirana/european-court-of-human-rights
[93] https://www.coe.int/en/web/tirana/european-court-of-human-rights
[94] https://www.coe.int/en/web/cm
[95] https://hudoc.echr.coe.int
[96] Reference is however made to the legitimate grounds for the detention of aliens to prevent unauthorised entries in the country or carry out deportations under Art. 5.1(f).
[97] See in particular Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto
[98] Refugee Rights and Realities, eds. Nicholson and Twomey, Cambridge University Press, 1999- Council of Europe, Human rights files, No. 9: Asylum and the European Convention on Human Rights, 15 December 2011, available at:

principle, the ECHR is not deemed to provide for a '*general right […] for a non-national to enter or remain in a State'.*[99] In its settled jurisprudence, the State's right to exclude aliens' access to its territory or to carry out return decisions on public safety considerations has been considered to be overridden by the obligation to protect certain rights and interests (when *inter alia* family or protection considerations are involved under Art. 2, 3 and 8). Specifically, as far as asylum seekers are concerned, the Court has considered that in certain cases to refuse entry, and/or to return a person may constitute a serious violation of rights protected by the ECHR, including of the right to life, the prohibition of torture or inhuman or degrading treatment or punishment, or flagrant denial of justice and of the right to liberty.[100] The ECHR jurisprudence in this field is extensive.[101]

2. Relevant provisions of the ECHR applying to asylum and migration-related cases

ECHR provisions of relevance in the context of Migration and asylum:

a) Art. 2 (Right to Life)
b) Art. 3 (Prohibition of torture)
c) Art. 4 (Prohibition of Forced Labour)
d) Art. 5 (Right to liberty and security)
e) Art. 6 (Right to a fair trial)
f) Art. 8 (Right to respect for private and family life)
g) Art. 13 (Right to an effective remedy)
h) Art. 14 (Prohibition of Discrimination)
i) Art. 4 Protocol no.4 (Prohibition of collective expulsion of aliens)

The main features of these Articles and their applicability in the context of migration and asylum cases will now be summarily outlined. A comprehensive analysis of the most relevant and recurring issues raised by asylum cases, with particular reference to Art. 3, 13 and Art. 4 of Protocol no. 4, will be then provided in the next chapters of this Handbook.

a) Art. 2 (Right to Life)

Under Art. 2 the Convention protects the Right to life providing as follows:

> *1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
> *(a) in defence of any person from unlawful violence;*
> *(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
> *(c) in action lawfully taken for the purpose of quelling a riot or insurrection.*

---

http://www.refworld.org/docid/4ee9b0972.html, p.10 – cross citing: *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of 11 January 2007, §135.

[99] See for instance, *Üner v. the Netherlands*, no. 46410/99, §54 and 56

[100] Specifically, Art. 2 and 3 ECHR enshrine absolute rights under the Convention – the right to life and the right not to be subjected to torture or inhuman and degrading treatment or punishment – which cannot be derogated from and must be taken into account in the context of decisions on the entry in the territory of the State and in return decisions. In *Saadi v. the UK*, the UK argued that when a decision to return was aimed at preventing a terrorist risk - and given that the returning State was not directly responsible for the treatment prohibited - the protection interest should be balanced with that of public safety. The Court clarified that the returning State had a positive obligation not to expel when such risk existed and that the conduct of the subject (and hence the public risk involved) was irrelevant to the duty to provide protection. When Art. 8 (Private and Family life) or other non-absolute rights are involved, the protection considerations can be weighted against public interest considerations.

[101] Just as a way of example, *Vilvarajah and Others v. the United Kingdom* no. 13163/87 et al. and *Cruz Varas and Others v. Sweden*, No. 15576/89 are among the first cases of the ECtHR in the field of asylum.

This provision must be read in conjunction with those under **Protocol No.6** (abolition of the death penalty) and **Protocol No. 13** (abolition of the death penalty in all circumstances, including war), which – for those States which ratified these instruments – further prohibit both the direct execution of death penalties and decisions to return to face a death penalty sentence (see: *Soering v. The UK*).[102] In the context of asylum, a Contracting State's responsibility may be engaged where an alien is deported to a country where there is serious risk of being executed as a result of the imposition of the death penalty (*Bader v. Sweden*, *Rrapo v. Albania, Al-Saadoon and Mufdhi v. the United Kingdom*). In *Al-Saadoon v. the United Kingdom* the Court decided to examine the applicants' claim that their transfer to the Iraqi Higher Tribunal subjected them to a real risk of being subjected to an unfair trial before the tribunal followed by execution by hanging under Art.3 instead of 2. Importantly, it was considered that Art.2 had been amended to prohibit the death penalty in all circumstances, given that all but two MS had signed Protocol 13 and all but three States, which had signed it, had ratified it. In other cases where the decision to return raises risks for the applicant's life or physical integrity, the case has decided to deal with the issue under Art. 3 and not Art. 2. As an example, in *H.L.R. v. France*,[103] the applicant's Art. 2 claim that his life would be threatened upon return in Colombia was analysed by the Court relying on Art. 3 instead. The same happened in *D. v. the United Kingdom*[104] and *Bahaddar*.[105] A comprehensive analysis of the current approach adopted by the Court when considering the extraterritorial application of Art. 2 was undertaken in *Bader v. Sweden*.[106]

In ***Bader v Sweden*** - The Court found a violation of Art. 2 concluding that the existence of a real risk of a death sentence being imposed following a "flagrant denial of a fair trial" prohibited the respondent State from returning the applicant to Syria.
Along similar line, in ***Al-Shari v. Italy*** the Court has established that an individual may not be extradited or expelled to another country where there are substantial and proven grounds for believing that the individual will be subject to the death penalty, provided that he/she first adduces prima facie evidence to substantiate any such risk.[107]
In ***Rrapo v. Albania***, the Court found no violation of Art. 2 and Protocol No. 13 as credible assurances had been given that the death penalty would not be sought in an extradition case. In ***Al-Saadoon and Mufdhi v. the United Kingdom,*** as it remained unclear after the handover that the applicants did in fact face capital charges, they preferred to consider the case under the 'fear and anguish' elements of Art. 3.
** Full case summaries of the cases mentioned are provided in the Case Law Appendix at the end of the chapter*

b) Art. 3 (Prohibition of torture/inhuman or degrading treatment)

The prohibition of torture or inhuman and degrading treatment under Art. 3 has recurrently been the object of the Court's attention in migration and asylum cases. Through its jurisprudence, the Court has repeatedly considered violations under this Article stemming from the decision to expel, return or reject aliens at the border or at sea, which were found to engage the responsibility of the Contracting State carrying out the return and, in some cases, also of the State of return, where it too was a party to the ECHR and indicated as defendant. Importantly, in addition to cases of return, a violation of Art. 3 in the field of migration and asylum can also arise from the material living conditions that the aliens are forced to endure, the conditions of detention or reception in migration facilities, among other things. On account of the paramount significance of the protection of Art. 3 and in view of the vast ECtHR jurisprudence on the matter, the key cases and issues raised under this provision will be dealt with in detail separately under **Chapter 2 of this Handbook.**

[102] *Soering v. the United Kingdom*, no. 14038/88.
[103] *H.L.R. v. France*, no. 24573/94
[104] *D. v. the United Kingdom*, no. 30240/96
[105] *Bahaddar v. the Netherlands*, no. 25894/94
[106] *Bader v. Sweden*, no. 13284/04; for the whole paragraph see: Mole, Nuala; Meredith, Catherine, *Asylum and the European Convention on Human Rights*, p.90
[107] *Al-Shari and others v. Italy*, no. 57/03

c) Art. 5 (Right to liberty and security)

Art. 5 ECHR protects the liberty and security of the person and sets out the guarantees applying to individuals in detention. Unlike the provisions examined above, this Article makes an explicit reference to the particular conditions under which the detention of aliens can be ordered and what safeguards apply to it. The list set in Art. 5 §1.a to f is exhaustive. Deprivation of liberty is only lawful if it is prescribed for one of the specified purposes and these are to be interpreted restrictively. The purpose must be identified. Detention, which is not prescribed for an identified purpose covered by Art. 5 §1.a to f, is automatically unlawful.[108]

ART. 5 - Right to liberty and security

> *1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: […]*
> *(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*
> *2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*
> *3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*
> *4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*
> *5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.*

Asylum seekers can find themselves in detention or severe restrictions of movement in many circumstances, especially in the context of mass influxes and mixed migration flows in relation to which it can be used for migration control purposes or in the context of pre-deportation detention, which they can be subjected to if they have been wrongly considered as irregular migrants and their protection needs have not been taken into account or rejected.[109]
The detention of migrants must not be arbitrary or unduly prolonged, and it must be authorised by a clear provision of national law with which it fully complies. In the later cases of *Yoh-Ekale Mwanje v. Belgium* and *Popov v. France* illustrate how a '*less stringent measures test'* is entering the Court's reasoning under Art. 5 (1) ECHR in migration detention cases.

The Court has considered the specific guarantees owed to asylum seekers in detention in several cases. In *S.D. v. Greece*,[110] the Court has emphasised that a clear distinction should be made between asylum seekers and other migrants noting that the measures of detention imposed on asylum seekers are applicable not only to those who have committed criminal offences but also to aliens who, often fearing for their lives, have fled from their own country. Asylum seekers should therefore be afforded a wide range of safeguards in line with their status, going beyond those applicable to irregular migrants.[111]

---

[108] Mole, Nuala; Meredith, Catherine, Asylum and the [ECHR], p.143
[109] Mole, Nuala; Meredith, Catherine, Asylum and the [ECHR], p. 133
[110] *S.D. v. Greece*, no. 53541/07, §65.
[111] *Saadi v. the United Kingdom*, no. 13229/03, §75, citing *Amuur v. France*, no. 19776/92, §43.

This is in line with the principle of non-penalisation of asylum seekers and refugees under the GC and with the rule whereby detention should only be resorted to on an exceptional basis when asylum seekers are involved.[112]

In *M.S.S. v. Belgium and Greece* the Court stated: "…[T]he confinement of aliens, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, in particular under the 1951 [GC and the ECHR]'.[113]
Among the cases considering the conditions of detention of asylum seekers, ***S.D. v. Greece***,[114] involved the holding of an asylum seeker in a border guard station, ***M.S.S. v. Belgium and Greece,***[115] where the applicant had been placed in detention immediately after his arrival and had been kept in crowded and unsanitary conditions and ***Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*** and ***Muskhadzhiyeva and Others v. Belgium*** and ***Rahimi v. Greece,*** where the Court considered the particular needs of unaccompanied migrant children in detention.

d) Art. 8 (Right to respect for private and family life)

The Court has considered the protection of this Article in the context of asylum observing that in some cases the deportation of an alien can result in the separation of a family may give rise to an issue under Art. 8. See for instance the case of ***Moustaquim v. Belgium*** in the Case Law Appendix to this Chapter.

e) Art. 13 (Right to an effective remedy)

Art. 13 provides for the right to have access to an effective remedy in place for any arguable violation of the ECHR's guarantees. This Article is not a standalone provision and must be considered in conjunction with an alleged violation of one or more of the Article of the Convention. In the context of Asylum, the Court has given consideration to the particular characteristics of the remedies owed to asylum seekers when considering the effectiveness of the remedies available to them, *inter alia,* to challenge detention or expulsion measures or to appeal an asylum decision, which they considered incorrect. In the context of expulsion to face a real risk of harm, the remedy provided must have automatic suspensive effect, in order to prevent an irreparable harm to the returnee. An effective opportunity to review the decision to return must be in place before such decisions to return are carried out. As an example see the case of *Gebremedhin v. France* summaries in the Case Law Annex at the end of this chapter.
It should finally be noted that Art. 6 of the ECHR, which establishes the right to a fair trial, does not apply to these challenges, as they concern neither criminal charges nor civil rights.

f) Art. 4 of Protocol No. 4 (Prohibition of collective expulsion of aliens)

Under both EU and ECHR law, collective expulsions are prohibited. A collective expulsion describes any measure that compels individuals to leave a territory or country as a group, and where this decision has not been based on a reasonable, objective and individualised examination of each person's particular case. The issue of collective expulsion is dealt with in detail in Chapter 5 of this handbook.

g) The Application Procedure before the ECtHR

[112] UNHCR, Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, Guideline 2 and 3; Commissioner for Human Rights, "States should not impose penalties on arriving asylum-seekers", 17 March 2008
[113] ECHR Factsheet on Migrants in Detention, at: http://www.echr.coe.int/Documents/FS_Migrants_detention_ENG.pdf
[114] *S.D. v. Greece*, application no. 53541/07
[115] M.S.S. v. Belgium and Greece, no. 30696/09

The ECtHR provides for the possibility to access the protection of the Court from two different routes, namely: the individual and the inter-State application. Insofar as asylum cases are concerned, the former is predominantly relied upon.

Art. 34 (Individual applications): Those who consider an ECHR provision to have been violated can complain to the ECtHR after they have exhausted all domestic remedies.

Rule 39 of the Rules of Court: In addition to the right to individual application above, another instrument of particular significance before the Court is that of 'interim measures' under Rule 39 of the Rules of Court of the ECtHR. Under Rule 39, the Court is conferred the power to adopt interim measures where these are required in order to prevent an imminent risk of irreparable harm. In the context of asylum and migration, Rule 39 measures occupy a central place in cases where a decision to return or expel is contemplated, as they can be requested to prevent a State from removing the individual before the ECtHR has examined the merits of a complaint, on grounds that he/she would be exposed to a risk in the event of removal, or request the State to take positive measures towards the vulnerable individual. Rule 39 measures are also used to protect the special needs of young/unaccompanied asylum seekers or vulnerable subjects who may be more exposed to risks in this sense.
Previously, 'indications' made under this rule were not considered to be binding, but since the judgments of *Mamatkulov and Askarov v. Turkey*, *Olaechea Cahuas v. Spain*, *Ben Khemais v. Italy*, States are deemed to be under an obligation to comply with Rule 39 requests. Failure to comply is in fact considered to hinder the exercise of the right of individual petition, thereby violating Art. 34 of the Convention. Only the ECtHR can decide to lift a Rule 39 request once it has been issued.
** A full case summary of the cases mentioned is provided in the Case Law Appendix at the end of the chapter*

h. Scope of application of ECHR

No one is excluded from ECHR protection (*Chahal v. the United Kingdom*). Nor can an individual lose protection due to their behaviour (*Ahmed v. Austria, see Section B above*) or the perceived threat they pose to the host State (*Saadi v. Italy, Othman v. UK*).
In terms of geographical scope, the ECHR also safeguards the rights of those intercepted on the high seas (*Hirsi Jamaa and Others v. Italy*), or held in transit zones of airports (*Amuur v. France*) as long as it can be proven that the authorities of the respondent State were exercising effective control over the applicants.
** Full case summaries of the cases mentioned are provided in the Case Law Appendix at the end of the chapter*

3. Appendix – Summaries from the European Court of Human Rights case law in the field of asylum

Ahmed v Austria[116]

Facts and Decision

The applicant was a Somali national who was granted refugee status after applying for asylum in Austria. Two years later, having been convicted of attempted robbery, his refugee status was forfeited under the Right to Asylum Act, according to which a person can lose refugee status if he commits a 'particularly serious crime.' The applicant's appeals against his subsequent expulsion order were dismissed by the Austrian court on the grounds that he was a danger to the community.
The ECtHR made clear in this judgment that it did not have jurisdiction to rule on whether the Austrian authorities had correctly applied the term 'particularly serious crime' so as to deprive the applicant of his refugee status and accompanying protection from return. The ECtHR has no jurisdiction to rule on the meaning of the provisions of the Geneva Convention. However, the ECtHR did go on to find that the applicant's deportation constituted a breach of ECHR Art. 3.

Comment

[116] Ahmed v. Austria, No. 25964/94

This case demonstrates the significant differences between the protections offered by the GC, under which a refugee can lose the right to *non-refoulement* if there are *'reasonable grounds for regarding as a danger to the security of the country in which he is, or who having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country.'* Under the ECHR, the conduct of the individual is irrelevant. If the Court finds that an individual would be exposed to a risk prohibited by Art. 3 upon return, they are protected from expulsion.

Bader and Kanbor v Sweden[117]

Facts and Decision

The applicant was a Syrian national who had applied for asylum in Sweden. While in Sweden he was convicted, *in absentia*, of having been complicit in a murder and was sentenced to death in Syria. Subsequent research carried out by the Swedish embassy indicated that he would be retried upon return and would not be given the death sentence if convicted, so his deportation order was upheld.

The Court considered the case only under Art. 2 and 3 of the Convention. The Court held that there were substantial grounds for believing that, if returned to his country of origin, Mr Bader would be exposed to a real risk of being executed and subjected to treatment contrary to Art. 2 (as the death penalty would be imposed following an unfair trial) and 3 (as a consequence of the fear and anguish suffered). Accordingly, the Court found that the deportation of Mr Bader and his family to Syria, if implemented, would amount to a violation of Art. 2 and 3 of the Convention.

Comment

Art. 2 does not in itself prohibit the imposition of the death penalty, but the Court has long held that it is a violation of Art. 3 to impose it following an unfair trial. The Court had decided in 1989, in the case of *Soering v. the United Kingdom*,[118] that the 'death row phenomenon' in the USA constituted a prohibited violation of Art. 3. Protocol No. 6 to the Convention abolished the death penalty, except in time of war. Protocol No. 13 abolished the death penalty in all circumstances and also prohibits States from putting anyone at risk of incurring it. At the time of this case, Protocol No. 13 had obtained the necessary number of ratifications to be in force and had, specifically, been ratified by Sweden. However, the fact that there were still a large number of CoE States who were yet to sign or ratify Protocol No. 13 prevented the Court from finding that it was the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Art. 3 of the Convention, which allows no derogation.

Since this case, a number of other complaints have been brought concerning expulsions to face the death penalty. In ***Rrapo v. Albania***,[119] the Court found no violation of Art. 2 and Protocol No. 13 as credible assurances had been given that the death penalty would not be sought in an extradition case. In ***Al-Saadoon and Mufdhi v. the United Kingdom***,[120] as it remained unclear after the handover that the applicants did in fact face capital charges, they preferred to consider the case under the 'fear and anguish' elements of Art. 3.

Saadi v. The United Kingdom[121]

Facts and Decision

The applicant, an Iraqi national, arrived in the UK and claimed asylum at the airport. He was granted 'temporary admission' and held in a detention centre for seven days while his asylum claim was being subjected to fast-track processing.

The Grand Chamber examined the concept of arbitrary detention in the context of the first limb of Art. 5(1)(f) authorising a detention to prevent the person making an unauthorised entry to the country. The Chamber noted that it is fundamental that no arbitrary detention can be compatible with Art. 5(1) and that the notion of 'arbitrariness' extends beyond lack of conformity with national law. Accordingly, 5(1)(f) detention would not be arbitrary if it met four conditions:

---

[117] Bader and Others v. Sweden, No. 13284/04

[118] Soering v. The United Kingdom, No. 14038/88

[119] Rrapo v. Albania, No. 58555/10

[120] Al-Saadoon and Mufdhi v United Kingdom, No. 61498/08

[121] Saadi v. United Kingdom, No. 13229/03

1. Carried out in good faith;
2. Closely connected to the purpose of preventing unauthorised entry to the country;
3. The place and conditions of detention were appropriate bearing in mind that the detainee was an asylum seeker rather than a suspected criminal;
4. The length of the detention did not exceed that reasonably required for the purpose pursued.

The Chamber found no violation of Art. 5(1) in this case, as the seven-day detention met these conditions.
Comment: In this case, the Grand Chamber explicitly refrained from applying the 'less stringent measures' test under Art. 5 (1)(f) ECHR. It should be noted that this case concerned the first limb of Art. 5(1)(f) ECHR that allows 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country', but the same reasoning applies under the second limb which allows arrest or detention with a view to deportation.

Moustaquim v. Belgium[122]
Facts and Decision
The applicant was a Moroccan national who migrated to Belgium at the age of one and then lived in Belgium continuously with his parents, until his deportation at the age of twenty due to his conviction of a large number of offenses. After his deportation, the applicant was an undocumented itinerant migrant. While in Stockholm, he was diagnosed with depression caused by the disruption of his family ties. He successfully applied for a stay of the Belgian deportation to return 'home'. On his return to Belgium, under the stay of deportation, the applicant challenged the deportation as a violation of his Art. 8 rights under the European Convention.
The Court held that despite the substantial number of the applicant's convictions, there was an unjustified interference with the applicant's right to be with his parents and his siblings who were all born in Belgium.
Comment: This case demonstrates the relevance of Art. 8 to asylum cases, which involve family separation. There is a fairly high threshold here, however: the court noted that the applicant had arrived in Belgium at the age of one and lived there continuously for twenty years, returning to Morocco only twice on holidays.

Gebremedhin v. France[123]
Facts and Decision
The applicant was an Eritrean national who arrived in France and was held in the airport's international waiting area. He made an urgent application to the Administrative Court requesting leave to enter the country with a view to applying for asylum, which was rejected. The Applicant lodged an application with the European Court of Human Rights, which indicated to the French Government, under Rule 39 of the Rules of Court (interim measures) that it was desirable not to remove him to Eritrea for the time being.
Under French law, in order to lodge an asylum application in France, foreign nationals had to be on French territory. Upon arrival at the border, they could not make such an application unless they were first given leave to enter the country. If they did not have the necessary papers to that effect, they had to apply for leave to enter on grounds of asylum. They were then held in a 'waiting area' while the authorities examined whether or not their intended asylum application was 'manifestly ill-founded'. If the authorities deemed the application to be 'manifestly ill-founded', they refused the person concerned leave to enter the country. He or she was then automatically liable to be removed without having had the opportunity to apply for asylum. While the individual in question could apply to the administrative courts to have the Ministerial decision refusing leave to enter set aside, such an application had no suspensive effect and was not subject to any time-limits.
The Court determined that the remedy available to the applicant to challenge the decision refusing leave to enter was ineffective because it did not have suspensive effect. Given the importance of Art. 3 and the irreversible nature of the harm that might occur if the risk of torture or ill‑treatment materialised, it was a requirement of Art. 13 that, where a State decided to remove a foreign national to a country where there

[122] Moustaquim v. Belgium, no. 12313/86,
[123] Gebremedhin v. France, no. 25389/05.

was real reason to believe they might face a risk of such ill-treatment, the person concerned must have access to a remedy with automatic suspensive effect (a remedy with such effect 'in practice' was not sufficient). The Applicant had not had access to such a remedy while in the waiting area. The Court found a violation of Art. 3 in conjunction with Art 13.

***Mamatkulov and Askarov v. Turkey*[124]**

Facts and Decision

The applicants were two Uzbek nationals who were extradited to Uzbekistan by Turkey after Uzbekistan claimed they had committed terror-related crimes, while the applicants countered that they were political dissidents and would face ill-treatment and torture if returned. Despite the Court ordering interim measures to defer, Turkey extradited both and they were sentenced to terms of imprisonment.

The Court found no violations of Art. 2, 3, or 6, but did find a violation of Art. 34 for Turkey's non-compliance with the interim measures.

Comment

In paragraph 128 of the judgement, the Court reiterated that *'by virtue of Art. 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Art. 34.*' In their observations, the partly dissenting judges noted that '*it can be deduced from paragraph 128 of the judgment that the majority wishes to attribute binding effect to such measures. The judgment bases the mandatory nature of interim measures essentially on Art. 34 of the Convention. Paragraph 128 of the judgment states that the failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint, as impeding the effective exercise of his or her right and, accordingly, as a violation of Art. 34 of the Convention (right of individual application).*' The binding nature of Rule 39 measures was thereby established, on the grounds that that if a Contracting State does not comply with Rule 39 measures and expels an applicant before a proper investigation of his or her complaints by the Court, the applicant is thereby hindered in the effective exercise of his or her right to individual petition under Art. 34 ECHR.

***Olaechea Cahuas v. Spain*[125]**

Facts and Decision

In 2003 the applicant was arrested in Spain under an international arrest warrant issued by the Peruvian authorities. Peru requested his extradition as a suspected terrorist. Noting that Peru was party to international fundamental rights protection instruments, including the American Convention on Human Rights, and that it had undertaken not to sentence the applicant to death or to life imprisonment, the Audiencia Nacional authorised his extradition. The applicant lodged an appeal against that decision, which was dismissed. On a request lodged by the applicant, the Court applied Rule 39 of its Rules of Court and asked the Spanish Government not to extradite the applicant to Peru until it had examined the case. Rule 39 measures were granted and the Spanish government were informed by telephone at 7pm on 6th August 2003. However, the following day the applicant was put on a plane and extradited to Peru, directly from the prison hospital. Three months later he was granted conditional release by the Peruvian authorities.

The Court found that in failing to comply with the interim measures indicated by virtue of Rule 39, Spain had not honoured its commitments in respect of Art. 34 and a violation was found.

Comment

The Court observed that an interim measure was, by its very nature, temporary, and the need for it was assessed at a given moment in time where a risk existed that might obstruct the effective exercise of the right to individual petition guaranteed by Art. 34. If a State failed to comply with the interim measure, the risk of obstruction of the effective exercise of the right to individual petition remained, and events subsequent to the Court's decision and the Government's failure to apply the measure would determine

[124] Mamatkulov and Askarov v. Turkey, nos. 4627/99 and 46951/99

[125] Olaechea Cahuas v. Spain, no. 24668/03

whether or not the risk actually materialised. Even if the risk failed to materialise, an interim measure was to be considered binding. A State could not defer its decision whether or not to apply the measure pending the possible confirmation of the existence of a risk.

Ben Khemais v. Italy[126]

Facts and Decision

The applicant was a Tunisian national. In March 2006, he received a prison sentence for assault in Italy. The Como District Court ordered that he be deported from Italy after he had served his sentence. In the meantime, by a judgment of 30 January 2002, the Tunis Military Court had sentenced the applicant in his absence to ten years' imprisonment for membership of a terrorist organisation. That conviction was apparently based exclusively on the statements of a co-accused. The applicant lodged his application with the European Court of Human Rights in January 2007. In March 2007, pursuant to Rule 39 of the Rules of Court, the Court indicated to the Italian Government to stay the order for the applicant's deportation pending a decision on the merits. However, on 11 June 2008 the Italian government informed the Court that a deportation order had been issued against the applicant on 31 May 2008 on account of his role in the activities of Islamic extremists, and that he had been deported to Tunisia on 3 June 2008. The Italian government also submitted documents to the Court containing diplomatic assurances that they had obtained from the Tunisian authorities, assuring that the applicant would not be subjected to torture, inhuman or degrading treatment or arbitrary detention.

The Court found a violation not just of Art. 34, but also of Art. 3, because 'serious and reliable international sources' such as Amnesty International had reported that allegations of torture and abuse in Tunisian prisons had not been investigated by Tunisian authorities.Tunisian assurances that the applicant would not be tortured or abused were insufficient in the absence of an effective system to prevent torture.

Comment

Rule 39 of the Court's Rules exists so that the Court can ensure that serious irreversible harm does not occur to an applicant pending the Court's substantive consideration of a case. It is not applied automatically and applicants need to make out a strong case in order to be granted a 'Rule 39 indication'. The usual practice of States Party to the ECHR has been to comply with such indications but since the Grand Chamber judgment in ***Mamatkulov and Askarov v. Turkey*** it has been clear that there is a legal obligation under Art. 34 of the Convention for States to comply with Rule 39 indications. In the present case Italy failed to do so. This is all the more unacceptable since the return of Ben Khemais to Tunisia occurred in the context of a very similar situation to that which had existed in ***Saadi v. Italy***. In that case, decided by the Grand Chamber just four months before the return of Ben Khemais, the Court emphatically re-affirmed the absolute nature of the prohibition on returning those suspected of terrorist activities to situations where there is a real risk that they will be subjected to torture or inhuman or degrading treatment. The Court paid particular attention to the fact that the State had not requested the Court to lift the Rule 39 indication, which it knew was still in force before carrying out the expulsion.

Saadi v. Italy[127]

Facts and Decision

The applicant was a Tunisian national who was arrested in Italy on suspicion of involvement in international terrorism. It was decided that, after serving his sentence, the applicant was to be deported to Tunisia. In 2006 the applicant lodged an application with the ECtHR and asked the Court, as an interim measure, to suspend or annul the decision to deport him to Tunisia. He claimed that terrorist suspects are frequently tortured in Tunisia and that his family there had received a number of visits from the police, and was constantly subject to threats and provocations. In 2007, the Italian government asked the Tunisian government for diplomatic assurances that if Saadi were to be deported to Tunisia, he would not be subjected to treatment contrary to Art. 3 of the ECHR and would not suffer a flagrant denial of justice.

[126] Ben Khemais v. Italy, no. 246/07

[127] Saadi v. Italy, [Grand Chamber], no. 37201/06

As the applicant had established a real risk that he would suffer severe maltreatment by the authorities if he was deported to Tunisia, the Grand Chamber determined that a breach of Art. 3 would occur if his deportation was to be implemented.

Comment

Along with ***Chahal v. the United Kingdom,*** this case exhibits the restrictive nature of Art. 3; there are no derogations to be made from Art. 3 irrespective of the character of the person involved. In this case against Italy, the United Kingdom intervened, unsuccessfully, to try to persuade the Court to depart from the approach it had taken in *Chahal.* The Grand Chamber held unanimously that if there was a real risk of exposure to absolutely prohibited treatment; the prohibition on expulsion was absolute. Moreover, following ***Saadi,*** diplomatic assurances should be examined in their 'practical application' so that there would be a 'sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention'. The 'weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.'

Hirsi Jamaa and Others v. Italy[128]

Facts and Decision

The Applicants were part of a group of about two hundred individuals who left Libya in 2009 aboard three vessels with the aim of reaching the Italian coast. On 6 May 2009, when the vessels were within the Maltese Search and Rescue Region of responsibility, they were intercepted by ships from the Italian Revenue Police and the Coastguard. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli. The applicants stated that during that voyage the Italian authorities did not inform them of their destination and took no steps to identify them. On arrival in the Port of Tripoli the migrants were handed over to the Libyan authorities. According to the applicants, they objected to being handed over to the Libyan authorities but were forced to leave the Italian ships. At a press conference held on the following day, the Italian Minister of the Interior stated that the operations to intercept vessels on the high seas and to push migrants back to Libya were the consequence of the entry into force, in February 2009, of bilateral agreements concluded with Libya, and represented an important turning point in the fight against clandestine immigration.

The Court found that the applicants were within the jurisdiction of Italy for the purposes of Art. 1 of the Convention. The principle of international law enshrined in the Italian Navigation Code envisages that a vessel sailing on the high seas was subject to the exclusive jurisdiction of the State of the flag it was flying. Accordingly, the events giving rise to the alleged violations fell within Italy's jurisdiction within the meaning of Art. 1 of the Convention.

Comment

This the first case in which the ECtHR delivered a judgment on interception-at-sea. The case is of significant relevance for those states, which are on the EU's southern and south-eastern borders. In situations where the risks on return are well known, return to that State is prohibited. Where a State returns someone to an intermediary State, which may subsequently return the person to her/his country of origin, this can also violate Art. 3. The Convention now clearly applies to States' immigration control operations wherever they take place – even on the high seas.

Amuur v. France[129]

Facts and Decision

[128] Hirsi Jamaa and Others v. Italy, [Grand Chamber], no. 27765/09

[129] Amuur v. France, no. 19776/92.

The applicants, four Somali nationals, arrived in France by airplane after fleeing Somalia due to fear for their lives there. They applied for asylum before the OFPRA after being granted legal aid. The Minister of Interior refused them the right to enter and therefore the applicants were sent back to Syria, while the other eighteen Somali nationals who travelled with them were granted refugee status. The applicants appealed unsuccessfully to the Refugee Appeals Board against that decision. The applicants complained that holding asylum-seekers in the international zone of an airport was in violation of Art. 5 paragraph 1 of the Convention.
The Court took note of the fact that holding third country nationals in international zones involved restrictions upon liberty. Nonetheless, it acknowledged that such confinement was acceptable if it was accompanied by the appropriate safeguards for the person concerned, in order to enable States to prevent unlawful immigration while respecting their international obligations. What is more, it added that such restriction could not be prolonged excessively. The Court observed that in this case, the applicants were held under strict police surveillance without access to legal or social assistance.
Furthermore, the Court held that the fact that an asylum-seeker can leave voluntarily the country where he/she wishes to take refuge cannot exclude a restriction on liberty. In addition, the right to leave any country-including one's own- as guaranteed by Protocol No. 4 of the Convention, can become theoretical if no other country offers protection similar to the one they were expecting to find in the country they sought asylum. The Court concluded that holding the applicants in the transit zone of the airport resulted in a deprivation of liberty, and found a violation of Art. 5 paragraph 1.

Comment: This judgement explicitly clarifies that ECHR safeguards apply equally to those held in international transit zones in the airports of Contracting States.

Chahal v. the United Kingdom[130]

Facts and Decision
The applicant was an Indian activist for Punjabi autonomy, who had been detained in India for passive resistance. He became an activist leader in the Sikh community in the UK. In 1990 he received a deportation order from the Home Secretary, on the grounds that his continued presence in the United Kingdom was not conducive to the public good for reasons of national security. The applicant was then detained for deportation purposes. The applicant complained that his deportation to India would violate Art. 3.
The Court reiterated that Art. 3 ECHR, which also applies in expulsion cases, prohibits torture and inhumane treatment in absolute terms; permitting no derogation even in the event of a public emergency threatening the life of the nation. It followed that, when an individual would face a real risk of being subjected to treatment contrary to Art. 3 if removed to another State, the responsibility of the Contracting State to protect that individual against such treatment is engaged in the event of expulsion, and the activities of the person in question, however disagreeable or dangerous, cannot be a material consideration. The Court thus rejected the Government's arguments that the threat to national security should be balanced against any risks to which Mr Chahal might be exposed. Accordingly, the order of the applicant's deportation to India would, if executed, amount to a violation of Art. 3.

Comment
This landmark decision affirmed a key element of the ECHR, which has been upheld in many cases since: that the prohibition on expulsion to face ill-treatment contrary to Art. 3 is absolute and cannot be weighed against the interests of national security. States are understandably reluctant to disclose intelligence sources for fear of compromising them, but the Court makes clear that they must find some other mechanism for dealing with non-nationals suspected of being a threat to national security, normally through criminal law (though it should be noted that in this case all criminal charges against Mr Chahal were either dropped or he was acquitted of them).

[130] Chahal v. the United Kingdom, no. 22414/93

D. The EU asylum *acquis* and the case law of the Court of Justice of the EU in asylum matters

The Republic of Serbia is not a member of the EU and is not formally bound by the EU asylum acquis, but only by their concurrent obligations under the GC and the ECHR (and other relevant international instruments). Nevertheless, the European Council granted Serbia the status of candidate country in 2012. The Stabilisation and Association Agreement (SAA) between Serbia and the EU entered into force in September 2013 and accession negotiations were launched in January 2014. In order to demonstrate its ability to assume the obligations of membership, Serbia has to align its legislation with the EU asylum acquis.

The EU *asylum acquis* is the corpus of law comprising the instruments, both Treaty provisions, Directives and Regulations, adopted by the Union as a part of the establishment of a **Common European Asylum System (CEAS)**. The implementation of the CEAS by MS must be compliant with the Charter of Fundamental Rights of the EU (CFR)[131] and is informed to the jurisprudence of the Court of Justice of the European Union ('CJEU'). The above instruments provide essential substantive and procedural guarantees for the processing of asylum application and the reception and treatment of asylum seekers. The CEAS is explicitly intended to be applied in accordance with the States' obligations deriving from the 1951 GC[132] and 'other relevant Treaties', under Art. 78 of the TFEU **(Treaty on the Functioning of the EU)**, including the **UN Convention against Torture (UNCAT) and the International Convention on Civil and Political Rights (ICCPR)**.

The instruments forming the CEAS include:

i. The **Dublin III Regulation**,[133] establishing criteria to determine the MS responsible for the asylum claim and regulating the transfers of asylum seekers to the responsible MS
ii. The **Recast Qualification Directive** (QD), which defines who is entitled to which type of protection and the consequent status and benefits; [134]
iii. The **Recast Asylum Procedures Directive** (APD)[135], which prescribes the procedures to be followed in the determination of asylum claims;
iv. The **Reception Conditions Directive** (RCD)[136], which lays down minimum standards for the reception, board and lodging and/or subsistence of asylum seekers;
v. The Regulation establishing a European Asylum Support Office (**EASO**);[137]
vi. The Regulation establishing the EU asylum fingerprint database (**EURODAC)**[138] which transmits the fingerprints of all applicants for asylum into a central system.

---

[131] Charter of Fundamental Rights of the European Union, 2000

[132] In the joined cases of N.S. and M.e. (C-411-10 and C-493-10) the CJEU has established that the operation of the CEAS is based on the full and inclusive application of Geneva Convention and Non Refoulment principle, under Art.18 CFR and 78 TFEU cross referring cases C-175/08, C 176/08, C 178/08 and C 179/08 *Salahadin Abdulla and Others* [2010] ECR I 1493, § 53, and Case C 31/09 *Bolbol* [2010] ECR I-5539, § 38).

[133] REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)

[134] COUNCIL DIRECTIVE 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

[135] DIRECTIVE 2013/32/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

[136] DIRECTIVE 2013/33/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

[137] REGULATION (EU) No 439/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 May 2010 establishing a European Asylum Support Office

[138] REGULATION (EU) No 603/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No

In principle the CEAS was intended to apply to all EU Member States (MS). However some EU MS retain particular status in relation of all or some of the instruments of the CEAS.

It is intended to ensure that the lack of harmonised decision making under the GC noted above is remedied – in relation to those who are entitled to ' refugee 'status within the EU and to provide a more harmonised definition of 'subsidiary protection' for those who are not Geneva Convention refugees. The purpose was to discourage 'secondary movement' of asylum seekers from one MS to another in search of a more fair and effective asylum process or better access to rights. It does not include the whole of the GC, and is narrower in the scope of its protection than the ECHR as it still excludes those who have an absolute right to international protection from return under the ECHR.

Outside of the CEAS, the 'Returns Directive', applying to return decisions affecting migrants found to be irregularly on the territory of the State, lays down rules relating to the regularisation or return of those migrants who have been given a final decision refusing them the right to stay in a Member State.[139]

1. Relevant Provisions under the EU Charter of Fundamental Rights (CFR)[140]

The EU CFR is an instrument of primary EU Law setting the core human rights standards that MS are bound to provide when implementing EU Law. The Charter became binding on MS and was recognised the same legal value of the EU Treaties with the coming into force in 2009 of the Lisbon Treaty (Art.6). The guarantees and provisions of the **Charter of Fundamental Rights** inform the asylum *acquis* in its entirety:

- **Art. 1 CFR (The Protection of Human Dignity):** Art.1 recognises the inviolable character of human dignity. The Explanations Relating to the CFR, under Title 1, Art.1,[141] describe human dignity as '*not only a fundamental right in itself but […] the real basis of fundamental rights*'[142], In asylum cases, the CJEU has stated that the prohibition under Art.4 is 'of fundamental importance' not only for the absolute character of the resulting obligations but for being '*closely linked to respect for human dignity*' under Art.1 CFR.[143] The duty to protect human dignity has been recalled by the CJEU when reaffirming MS' obligations to provide minimum standards of reception through the asylum procedure.[144]

- **Art. 4 (The Prohibition of Torture and Inhuman or Degrading Treatment):** establishes the absolute prohibition of torture and inhuman or degrading treatment, which corresponds to Art.3 ECHR[145]. In its jurisprudence, the CJEU has considered that '*systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers*' can give grounds to a violation of Art. 4.[146]

- **Art. 18 (Right to Asylum):** The CFR explicitly recognises the right to asylum, which shall be granted in a manner consistent with the terms and guarantees set under the1951 Geneva Convention and

---

1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) - http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0603&from=EN [accessed 11 October 2017]

[139] COUNCIL DIRECTIVE 2008/115 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Returns Directive)

[140] The EU Charter of Fundamental Rights (CFR) became legally binding with the coming into force of the Lisbon Treaty, Art. 6 of which grants it the same legal status as the EU treaties themselves.

[141] Explanations Relating to the Charter of Fundamental Rights, Title 1 - Human Dignity, Explanation on Art. 1, 2007/C 303/02 (Annex 25) and See Joined Cases Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen C-404/15 and C-659/15 , §85

[142] Ibid and, as far as the ECtHR is concerned see *Khlaifia v. Italy,* no. 16483/12, §158 It is also a value of civilisation closely bound up with respect for human dignity, part of the very essence of the Convention

[143] See *Aranyosi and Căldăraru*, C-404/15, C-659/15 PPU, §85, 86

[144] C-79/13, *Cimade and Gisti, ,* §56.

[145] The CJEU explicitly stated the correspondence of Art.4 to Art.3 in terms of both 'meaning' and 'scope', in line with the principle established under Art.52(3) CFR in Joined Cases C-404/15 and C-659/15, above, §86

[146] Joined Cases of *NS and ME,* C-411/10 and C-493/10, 21 December 2011, §123(2).

its Protocol and within the terms of the TFEU.[147] The right to asylum is recognised as a **subjective and enforceable right** for those individuals who may be eligible for international protection under any instrument of international law or as a consequence of the principle of *non- refoulement* as established in the Convention jurisprudence. Art.18 CFR embraces the following elements:

(a) Access to fair and efficient asylum procedures and an effective remedy;
(b) Treatment in accordance with adequate reception and (where prescribed by law, necessary and proportionate) detention conditions; and
(c) The grant of international protection in the form of refugee or subsidiary protection status when the criteria are met.

- **Art. 19(1)** of the Charter prohibits collective expulsion of aliens, which is thus prohibited where EU law applies EU law even in states not party to ECHR Protocol 4 (the United Kingdom, Greece, Turkey and Switzerland). Art. 19 CFR, which reflects Art. 4 of Prot.4 ECHR, and prohibits collective expulsions as well as the expulsion and the extradition to a country where there would be a 'serious risk' that the returnee would be subject to treatments contrary to Art. 4 or to the death penalty.

- **Art. 19(2) and Art. 4** of the Charter essentially prohibit MS from returning an individual to a situation where he would be at risk of torture, inhuman or degrading treatment or punishment. This includes rejection at the frontier, interception and indirect *refoulement*.

- **Art. 24 - The rights of the child –** Art. 24 protects the special situation of children under EU Law, incorporating the CRC principle whereby the child's best interests must be a primary consideration in all actions concerning children. This principle is of relevance in all cases concerning migrant children, as is the principle, at §3 of this Article, whereby the relationship and contact with the parents should be maintained save where this is not in the child's interests.

- **Art. 41** of the Charter, the right to good administration, is of very broad scope and applies even if there is no specific procedure in place. It reflects a general principle of EU law that all those who come within its remit are entitled to effective legal protection of their EU rights. This means that law and practice must ensure that protection. This also means that those intercepted on the high seas must be brought to the territory of a MS to assess whether their return would violate the principle of *non-refoulement*.[148]

- **Art. 47** of the Charter provides that the guarantees of a fair trial under Art. 6 ECHR must apply to all proceedings to which the Charter applies. Therefore the guarantees apply to all asylum matters under EU law, despite not applying under the ECHR. Under which the only right to a remedy is in Art 13 Art. 47 also expressly requires an effective remedy to be available where it is engaged.

- Finally **Art. 52 and 53** regulate the relationship between the CFR and other international instruments, including the ECHR.

2. The Common European Asylum System (CEAS)

The **Dublin III Regulation** (also referred to as the 'Dublin system') is the legal basis within the EU for deciding which EU MS is responsible for determining an asylum claim. The Dublin system is a responsibility allocation mechanism for EU MS, and not a burden sharing mechanism in terms of the distribution of the number of asylum claims lodged in the EU. It sets out the criteria to be applied in order to reach these

[147] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, see also (joined cases) C-411/10 and C-439/10, *N.S. and M.E. and case C-175/11 HID, BA.*
[148] Beck, Gunnar, Nuale Mole, and Marcelle Reneman. "The application of the EU Charter of Fundamental Rights to asylum procedure law, European Council on Refugees and Exiles." (2014), p.39.

decisions. The first step to be taken when an individual applies for asylum in any EU MS is to decide which State is responsible for determining the claim. The host State should request another MS (where the applicant has e.g. appropriate family connections) to 'take charge' of the claim, but can also ask another MS to 'take back' the applicant if relevant criteria apply. The criteria are applied in a strict hierarchy, with family links and the interests of minors taking precedence. In practice, the criterion primarily and most commonly applied in 'take back' cases is the applicant's first point of irregular entry into the EU.

The **EURODAC Regulation**[149] establishes a EU asylum fingerprint database, which transmits the fingerprints of all applicants for asylum into a central system. This is used to assist the Dublin process by providing evidence of an applicant's first point of irregular entry into the EU, and thereby identifying the MS responsible for processing their application.

The **European Asylum Support Office (EASO)** is an agency of the European Union, which supports the implementation of the Dublin system by assisting with the relocation of international protection applicants, offering technical and operational assistance to MS.
People applying for asylum in one MS will normally be transferred to another one, if it appears that the latter State is responsible under the Dublin criteria. Certain non-EU States are also parties to the Dublin system (Iceland, Norway and Switzerland).

The QD provides a definition applicable across the EU of who is entitled to international protection in EU law. It provides for recognition as a 'refugee' as defined by the GC, or for 'subsidiary protection' for those at risk of serious harm. The definition of 'serious harm' overlaps to some extent with the protection offered by the ECHR. However, the QD, like the GC but unlike the ECHR, excludes those considered undesirable or undeserving from its benefits (Art. 12). The QD also sets out the benefits bestowed upon those who are recognised as qualifying for protection (Art. 20 to 35).
The APD sets out important and detailed procedural safeguards and procedures, which States must observe in respect of those seeking asylum. It applies on the territory, at the borders and in territorial waters, and in transit zones of MS (Art. 3)[150]. It also identifies a number of situations where those procedures do not have to be applied in full (Art. 33).
The RCD sets out the minimum material and social conditions which must be provided to asylum seekers whilst they are awaiting the determination of their claims. Asylum seekers subjected to the Dublin return procedures are also entitled to the benefit of this Directive. Both the APD and the RCD have provisions relating to freedom of movement and to detention (respectively Art. 26 of the APD and Art. 8 of the RCD).
There is some crossover with EU MS' accountability to ECHR for the protection of obligations under EU law:

3. The Role of the Court of Justice of the EU and its jurisprudence

CJEU jurisprudence has an influence on the interpretation of international refugee law, in the absence of a supranational legal body for the implementation of the 1951 Geneva Convention. Given that EU asylum policy must be in accordance with the 1951 Geneva Convention, the ECHR and any other relevant treaties (see Art. 78 (1) of the Treaty on the Functioning of the European Union, Art. 52 para 3 of the CFR, Recitals 2, 3, 4 and 17 of the QD 2011/95/EU), the Court should play a pivotal role in interpreting the law so as to be

[149] REGULATION (EU) No 603/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on the establishment of ・Eurodac・ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) - http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0603&from=EN [accessed 11 October 2017]

[150] N. B. the judgment in *Hirsi Jamaa and Others v. Italy* (judgment of 23 February 2012) could have an impact on the geographical scope of the APD. Although this judgment related to an ECHR violation, it expanded the definition of 'territory' to include vessels bearing the flag of a certain state. Although case law so far has been inconclusive, there could be scope to argue for an extension of the *Hirsi* judgment to EU law.

in compliance with these international instruments. **The Court of Justice of the European Union** (the Luxembourg court) and the European Court of Human Rights (the Strasbourg court) often refer to each other's decisions to support respective decisions.

Art 52(3) of the EU Charter directly refers to the ECHR for the interpretation of provisions.

There is however no practical access, comparable to the access to the ECtHR, to the CJEU for individual asylum seekers who consider that they have not correctly enjoyed the benefit of the *acquis* or the Charter. Aggrieved individuals can challenge acts or omissions of national bodies relating to EU asylum law in the national courts of EU Member States. Those courts may (and sometimes must) refer questions of interpretation of the *acquis* or the Charter to the CJEU for preliminary rulings. All of the CJEU decisions in this handbook have been rendered under this referral procedure. It is also possible for the EU Commission to bring 'infringement proceedings' against EU States, which are failing to comply with their obligations under the EU asylum *acquis* or annulment proceedings for acts of the EU bodies.

E. Application of the European Convention for the Protection of Human Rights and Fundamental Freedoms in Asylum and Migration Matters – Legislative Framework of the Republic of Serbia

Status of International Law in the Legal Order of the Republic of Serbia

An important consideration to be borne in mind when reviewing an asylum case is that domestic law cannot be applied without taking into account the international norms and standards binding on the Republic of Serbia and which have been exposed in the sections above.
The Constitution of the Republic of Serbia[151] includes several relevant provisions on the status of international law in the domestic legal order. Under Art. 16(2) of the Constitution, "[G]enerally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly." While the expression "generally accepted rules of international law" denotes common law rules, the expression "ratified international treaties" actually refers to the international treaties ratified by and binding on the Republic of Serbia.
All civil servants ruling on the status of asylum seekers and the rights of refugees and migrants must take the relevant international norms into account. In Serbia's legal order, these norms are hierarchically immediately below the Constitution and above laws and by-laws. Although the above-mentioned Art. of the Constitution specifies in paragraph 3 that ratified international treaties must be in accordance with the Constitution, Art. 194 of the Constitution lays down that ratified international treaties and generally accepted rules of international law shall be part of the legal system of the Republic of Serbia and that laws and other general acts enacted in the Republic of Serbia "may not be in noncompliance with the ratified international treaties and generally accepted rules of international law".

Art. 18 of the Constitution provides for the direct implementation of human and minority rights guaranteed by the Constitution.

Art. 18(2) of the Constitution:

"The Constitution shall guarantee, and as such, directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws. The law may prescribe the manner of exercising these rights only if explicitly stipulated in the Constitution or necessary to exercise a specific right owing to its nature, whereby the law may not under any circumstances influence the substance of the relevant guaranteed right."

[151] Official Gazette of the Republic of Serbia No. 98/2006.

The Constitution also imposes the obligation of monitoring and referring to the case law of, *inter alia*, the European Court of Human Rights.

Art. 18(3) of the Constitution:
"Provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation."

1. 1951 Convention Relating to the Status of Refugees

The Republic of Serbia, as a State successor of the former Socialist Federal Republic of Yugoslavia (SFRY), has been a party to the GC since 12 March 2001.[152] Serbian courts and other State authorities are under the obligation to interpret the provisions of the national law in accordance with the GC. The provisions of the GC have, however, been implemented in Serbia's legal order specifically through the Asylum Act, wherefore the competent authorities directly apply the domestic regulations rather than the provisions of the GC .

2. The Republic of Serbia and the ECHR

The Republic of Serbia signed the ECHR on 3 April 2003 and ratified it on 3 March 2004, when it entered into force in respect of the Republic of Serbia.[153] By ratifying the ECHR, the Republic of Serbia accepted the jurisdiction of the ECtHR. Serbian courts and other State authorities are under the obligation to interpret the provisions of national law in accordance with the ECHR and the ECtHR's case-law. They have referred in their decisions to the provisions of the ECHR and the standards established in ECtHR's case-law.
The case-law of the Serbian Constitutional Court indicates, however, that, where the provisions of the ECHR are essentially identical to the corresponding provisions of the Serbian Constitution, the Constitutional Court has reviewed the violation of the right in issue by referring to the relevant provisions of the Constitution, whilst taking into account the ECtHR's case-law. The Constitutional Court has applied European standards established by the ECtHR in asylum cases as well.[154]
Authorities taking decisions in asylum cases are also under the obligation to monitor, respect and refer to ECtHR case law. Of particular relevance is the following judgment of the Administrative Court, in which it underlined the need to take into account the human rights and freedoms enshrined in the ECHR:

"During its reconsideration of the appeal, the respondent authority shall perform a clear and full assessment of all the claims in the appeals in terms of the quoted provisions of the Asylum Act and shall, on the basis of such an assessment, decide on the content and volume of the right the plaintiff is entitled to under the law, whilst ensuring that the decisions of administrative authorities in this matter are directly related to the realisation of the plaintiff's right to the protection of his fundamental human rights and fundamental freedoms enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto, which are integral parts of the legal order of the Republic of Serbia."[155]

3. The Republic of Serbia and the CEAS

As mentioned above, the Republic of Serbia is not a member of the EU and therefore it is not bound by its *acquis* on asylum and migration. However, it should be reiterated that given its status of an EU candidate State since 2012, the Republic of Serbia is under the obligation to align its legislation and practices of its competent authorities with the EU *acquis communautaire*.

---

[152] SFRY ratified the Convention in 1960. Official Journal of the SFRY – International Treaties No. 7/60. I added the blue text FYI
[153] Official Journal of SaM – International Treaties No. 5/2005.
[154] Constitutional Court Ruling Uzz -5331/2012 of 24 December 2012, Constitutional Court Decision Uzz -1286/2012 of 29 March 2012, Constitutional Court Decision Uzz -3548/2013 of 19 September 2013, Constitutional Court Decision Uzz -6596/2011 of 2014.
[155] Administative Court, Judgment 12 U 17279/13 of 10 July 2015.

The Stabilisation and Association Agreement between the Republic of Serbia and the European Union entered into force in September 2013, and the EU accession talks began in January 2014. The field of asylum and migration is covered by Chapter 24 – Justice, freedom and security.
In its annual reports on Serbia's progress, the European Commission has been regularly commenting on the headway achieved in the field of asylum and migration and recommending steps the Republic of Serbia should take to align its legislation with the CEAS. In its Serbia 2016 Report, the EC stated that the Asylum Act was being amended to align the legal framework with the *acquis* and underlined that the new law should foresee effective access to the asylum procedure, independent of the applicant's nationality, through correct and timely treatment of asylum applications. It particularly criticised the criteria for designating countries as safe countries of origin or as safe third countries and the procedure for the review of such designations and said they had yet to be fully aligned with the *acquis*. The EC welcomed Serbia's adoption of an emergency response plan to cope with a sudden large influx of migrants. As regards the asylum procedure, the EC voiced doubts about the capacity of the authorities competent for reviewing asylum applications and noted the need for more training, notably on countries of origin and interviewing techniques. It said that further efforts to integrate beneficiaries of international protection were needed by a credible budget and that Serbia needed to continue close cooperation with EU MS and neighbouring countries with a view to ensuring effective access to international protection.

Status of Aliens in the Republic of Serbia

1. Relevant Constitutional Provisions

The status of aliens in the Republic of Serbia is laid down in Art. 17 of the Constitution:

"Pursuant to international treaties, aliens in the Republic of Serbia shall have all the rights guaranteed by the Constitution and law, with the exception of rights to which only the citizens of the Republic of Serbia are entitled under the Constitution and law."

Art. 21 of the Constitution enshrines the principle of equality and prohibition of discrimination applicable to everyone.

The right to asylum is provided for in Art. 57 of the Constitution, which reads:

"Aliens reasonably fearing persecution on grounds of race, gender, language, religion, ethnicity, membership of a group or political opinion, shall have the right to asylum in the Republic of Serbia."

The Constitution further lays down that the asylum procedure shall be governed by a separate law. Apart from the right to asylum, the Constitution of the Republic of Serbia also enshrines other human rights relevant to asylum and migration (right to life, inviolability of physical and mental integrity, right to liberty and security, right to equal protection of rights and a legal remedy, freedom of movement, inviolability of home, confidentiality of letters and other forms of communication, personal data protection, freedom of thought, conscience and religion, right to legal aid, health care, right to education).

2. Legal Framework

Two laws, the Aliens Act and the Asylum Act, are relevant to the field of asylum and migration.

The **Aliens Act**[156] governs conditions under which aliens may enter, move and reside in Serbia and the remits and duties of the Serbian state administration authorities concerning the entry, movement and residence of aliens in its territory. An alien shall denote every person who does not have the citizenship of the Republic of Serbia (Art. 3(1) of the Act). Pursuant to Art. 2, this Act shall not apply to aliens who have

[156] Official Gazette of the Republic of Serbia No. 97/2008.

applied for asylum or have been granted asylum in the Republic of Serbia or to aliens granted refugee status

Art. 42-45 of the Aliens Act govern the unlawful presence of aliens in the territory of the Republic of Serbia. Aliens may enter and stay in the Republic of Serbia, subject to this Act, with a valid traveling document containing a visa or residence permit, unless otherwise provided by the law or an international treaty (Art. 4). On the other hand, unlawful entry into the Republic of Serbia shall comprise: 1) Entry out of place and time determined for crossing of the State border; 2) Entry by avoiding border control; 3) Entry by use of someone else's, unlawful, i.e. false travel or other document; 4) Entry by giving false data to the border police; 5) Entry during the validity of a protective measure of removal of aliens from the territory of the Republic of Serbia, a security measure of expulsion of aliens from the country or a residence revocation measure.

The Act also lays down the procedure for the forcible removal of aliens from the territory of the Republic of Serbia.

The Asylum Act of the Republic of Serbia[157] governs the principles, conditions and procedure for the granting and cessation of asylum, as well as the status, rights and obligations of asylum seekers and persons granted the right to asylum in the Republic of Serbia. Under Art. 65 of the Act, its provisions shall be interpreted in accordance with the 1951 Refugee Convention, the 1967 Protocol thereto and the generally accepted rules of international law. Art. 4 of the Act guarantees the right to seek asylum to aliens present in the territory of the Republic of Serbia.

The Asylum Act lays down the following main principles protecting asylum seekers, notably: prohibition of expulsion and *refoulement* (Art. 6), non-discrimination (Art. 7), non-punishment for unlawful entry or residence (Art. 8), family unity (Art. 9), provision of information and legal aid (Art. 10), free interpretation/translation services (Art. 11), free access to the UNHCR (Art. 12), right to have the documents related to the asylum proceedings delivered to either the asylum seeker personally or their legal representative (Art. 13), gender equality (Art. 14), provision of care to persons with special needs (Art. 15), representation of unaccompanied minors and legally incapacitated persons (Art. 16), directness (Art. 17), and confidentiality (Art. 18).

The Act includes provisions specifying the competent authorities (Art. 19-21), the asylum procedure (Art. 22-35) and temporary protection (Art. 36-38). The Asylum Act also provides for a list of rights and obligations of asylum seekers, refugees and persons granted subsidiary protection. These include the right to residence in the Republic of Serbia, accommodation and basic living conditions (Art. 39), the right to health care (Art. 40), the right to free primary and secondary education and the right to welfare (Art. 41).

The Act distinguishes between the refugees' rights equal to those of the nationals of the Republic of Serbia (Art. 42) and their rights equal to those of permanently residing aliens (Art. 43). Art. 47 specifies the obligations of asylum seekers.

3. ECHR Provisions of Relevance to Asylum Issues in National Law

Art. 2 of the ECHR *(right to life)*

The Constitution of the Republic of Serbia enshrines the right to life in Art. 24, specifying that human right is inviolable and that there shall be no death penalty in the Republic of Serbia.

The Asylum Act of the Republic of Serbia introduces a prohibition of expulsion to a territory where the alien's life would be at risk.

Under Art. 6(1) of the Asylum Act:

[157] Official Gazette of the Republic of Serbia No. 109/2007.

"No one shall be expelled or returned against his/her will to a territory where his/her life or freedom would be threatened on account of his/her race, sex, language, religion, ethnicity, membership of a particular social group or political opinion."

Threat to life is implicitly recognised in the definition of refugee protection and explicitly in the definition of the other two forms of international protection: subsidiary protection (Art. 2(1(8)) and temporary protection (Art. 36). Furthermore, threat to life is recognised as one of the main criteria for determining which countries cannot be considered "safe third countries" (Art. 2(1(11)).

Art. 3 of the ECHR *(prohibition of torture and inhuman or degrading treatment)*

Torture and inhuman or degrading treatment is prohibited both by the Constitution and the laws of the Republic of Serbia (see relevant part of this booklet).

Art. 5 ECHR *(right to liberty and security)*

The Constitution of the Republic of Serbia safeguards the right to liberty and security of person in Art. 27 and includes several other provisions covered by Art. 5 of the ECHR, notably, in Art. 29, laying down additional rights in case of deprivation of liberty in the absence of a court decision, and in Art. 30 and 31, governing pre-trial detention and its duration.

Art. 27 (right to liberty and security):

"Everyone has the right to liberty and security of person. Deprivation of liberty shall be allowed only on the grounds and in a procedure stipulated by law.
Everyone deprived of liberty by a State authority shall be informed promptly in a language he understands of the reasons for his deprivation of liberty, charges brought against him, and his rights, including the right to notify any person of his choice of his deprivation of liberty without delay.
Everyone deprived of liberty shall have the right to initiate proceedings before a court, which shall speedily rule on the lawfulness of the deprivation of liberty and order his release in the event the deprivation of liberty was unlawful.
Only a court may impose a sentence entailing deprivation of liberty."

The Criminal Code[158] includes provisions on pre-trial detention (Art. 201-216) and on the treatment of detainees (Art. 217-222).

The Aliens Act allows the holding of aliens in the premises of the competent authority.

Art. 48 (holding of aliens):

"Aliens may exceptionally be held in the premises of the competent authority, if so required to secure their forcible removal and for a maximum of 24 hours.
The Police Act shall apply to holding of aliens."

The Aliens Act includes provisions on the referral of the aliens to the Aliens Shelter (Art. 49-53) in case they cannot be immediately forcibly removed, in case their identity has not been established or they lack travel documents, and in other cases prescribed by law, as well as on their mandatory residence in a specific place (Art. 54) and the termination of that measure (Art. 55).

[158] Official Gazette of the Republic of Serbia No. 72/11, 101/11, 121/12, 32/13, 45/13 и 55/14.

The Asylum Act lays down the principle of non-punishment for unlawful entry and residence in the territory of the Republic of Serbia (Art. 8), reasons for restriction of movement (Art. 51), movement restriction measures (Art. 52), and [the consequence of] non-compliance with restriction of movement (Art. 53).

Art. 8 (principle of non-punishment for unlawful entry or residence):

"Asylum seekers shall not be punished for unlawfully entering or residing in the Republic of Serbia, provided they submit asylum applications without delay and offer a reasonable explanation for their unlawful entry or residence."

Art. 51 (reasons for restrictions of movement):
"The movement of asylum seekers may be restricted by a decision of the Asylum Office, when such restriction is necessary to:

1) Establish their identity;

2) Ensure their presence in the course of the asylum procedure, if there are reasonable grounds to believe that they applied for asylum with a view to avoiding deportation, or if it is impossible to establish other essential facts on which their asylum applications are based in their absence; or,

3) Protect national security and public order in accordance with the law.

Art. 52 (movement restriction measures):

"Restriction of movement shall be implemented by:

1) Ordering accommodation at the Aliens Shelter under intensified police surveillance;

2) Imposing a ban on leaving the Asylum Centre, a particular address and/or a designated area.

Restriction of movement shall last for as long as the reasons referred to in Art. 51 of this Act apply, but not longer than three months.

Notwithstanding the above, when restriction of movement was imposed for the reasons referred to in Article 51(1), sub-paragraphs 2) and 3) of this Law, restriction of movement may be extended another three months.

An appeal against a decision imposing or extending the measure referred to in paragraph 1(1) of this Article shall be ruled on by the competent district court.

The provisions of Art. 53 of the Police Act (Official Gazette of the Republic of Serbia No. 101/05) shall apply accordingly to the procedure for reviewing appeals referred to in paragraph 4 of this Article.

An appeal against a decision on the restriction of movement shall not have suspensive effect."

Art. 53 (non-compliance with restriction of movement):

"An asylum seeker who has violated the ban referred to in Art. 52(1(2)) of this Law, may be referred to the Aliens Shelter."

***Art. 8** (right to respect for private and family life)*

The Constitution of the Republic of Serbia does not include a provision on the respect for private and family right, but it does protect this right in the following provisions: right to dignity and free development of personality (Art. 23), inviolability of home (Art. 40), confidentiality of letters and other means of communication (Art. 41) and personal data protection (Art. 42). However, it needs to be noted that the

Constitution of the Republic of Serbia does not guarantee the principle of family unity, which is the most important aspect of Art. 8 of the ECHR in asylum matters.

Art. 23 (dignity and free development of personality):

"Human dignity is inviolable and everyone shall be obliged to respect and protect it.

Everyone shall have the right to free development of his personality provided he thereby does not violate the rights of others guaranteed by the Constitution."

The Aliens Act lays down that temporary resident permits may be granted to aliens intending on staying in the Republic of Serbia longer than 90 days, inter alia, for the purpose of reuniting with their families (Art. 26(1(3)). That law governs in greater detail the issuance of temporary residence permits for the purpose of family reunion (Art. 32), extension of temporary residence permits (Art. 33), temporary residence of minor aliens born in Serbia (Art. 34) and revocation of temporary residence permits (Art. 35).

Art. 32 (temporary residence for the purpose of family reunion):

"Aliens, who are members of the immediate family of nationals of Serbia or of aliens granted permanent or temporary residence, may apply for temporary residence and residence for the purpose of family reunion.
In terms of this Act, immediate family members shall comprise: spouses, their underage children born in or out of wedlock, and their underage adopted or step-children.
Exceptionally, other relatives may be considered immediate family members, if there are particularly important personal or humanitarian reasons for family reunion in the Republic of Serbia.
Fulfilment of the requirements under paragraphs 1 and 3 of this Article shall be governed in greater detail in a regulation enacted by the Minister of Internal Affairs, with the consent of the Social Policy Minister."

The Asylum Act also includes several relevant provisions, including, notably the one laying down the principle of family unity.

Art. 9 (family unity principle)

"The competent authorities shall take all the available measures to maintain family unity during the asylum procedure and after the right to asylum is granted.

Persons granted asylum shall have the right to reunite with their families, in accordance with the provisions of this Act."

Under Art. 2(1(12)) of the Asylum Act, family members shall denote: underage, adopted or step children who are not married, spouses, provided that the marriage had been entered into before arrival in the Republic of Serbia, as well as parents or adoptive parents legally obliged to support them. The status of family member may also be granted to other persons in exceptional circumstances, particularly taking into account the fact that they have been supported by the person granted refuge or subsidiary protection.

Persons granted refuge have the right to reunite with their families. At their request, the Asylum Office shall recognise the right to refuge to their family members living outside Serbia, unless there are statutory reasons for denying them such status (Art. 48).

Persons granted subsidiary protection have the right to family reunion in accordance with regulations governing the movement and residence of aliens (Art. 49).

The competent authorities may, in justified cases, allow family reunion and grant temporary protection also to family members of persons enjoying temporary protection in the Republic of Serbia (Art. 50).

***Art. 13 ECHR** (right to an effective legal remedy)*

The Constitution of the Republic of Serbia guarantees everyone the right to equal protection of rights and a legal remedy in Art. 36.

Art. 36 (right to equal protection of rights and a legal remedy):

"Everyone shall have the right to an appeal or another legal remedy against any decision on his rights, obligations or lawful interests."

The Asylum Act does not guarantee the right to an effective legal remedy, but it does specify a deadline by which appeals of first-instance decisions must be lodged – 15 days from the day of receipt of the decision. The other rules are governed by the General Administrative Procedure Act,[159] which proclaims the principle of efficiency in Art. 7:

"The authorities conducting the procedures, i.e. deciding administrative issues shall ensure the successful and high quality realisation and protection of the rights and legal interests of natural persons, legal persons or other parties."

However, under the Administrative Disputes Act,[160] an action filed with the Administrative Court challenging a legal enactment does not, as a rule, stay the enforcement of the impugned enactment, i.e. that Act does not provide for the suspensive effect of the action.

***Art. 14 of the ECHR and Art. 1 of Protocol No. 12 to the ECHR** (prohibition of discrimination)*

Art. 21 of the Constitution of the Republic of Serbia proclaims the principle of equality and prohibits discrimination on any grounds, expressly recognising that special measures shall not be deemed discrimination.

Art. 21 of the Constitution (prohibition of discrimination):

"All are equal before the Constitution and law.

Everyone shall have the right to equal legal protection, without discrimination.

Any direct or indirect discrimination based on any grounds, particularly on race, sex, ethnicity, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited.

Special measures, which the Republic of Serbia may introduce to achieve full equality of individuals or a group of individuals in an essentially unequal position compared to other citizens, shall not be deemed discrimination."

The Anti-Discrimination Act[161] is the general anti-discrimination law in the Republic of Serbia, which prohibits every unjustified distinction or unequal treatment or act of omission, based, inter alia, on

[159] Official Gazette of the Republic of Serbia No. 18/16.
[160] Official Gazette of the Republic of Serbia No. 111/09.
[161] Official Gazette of the Republic of Serbia No. 22/09.

nationality. The Act expressly prohibits discrimination in procedures before public authorities and lays down that everyone shall have the right to equal access to and equal protection of their rights before courts and public authorities (Art. 15). This Act also qualifies advocacy of and actual discrimination by the public authorities or in procedures before public authorities as a grave form of discrimination (Art. 13(1(2)).

The Asylum Act proclaims the principle of non-discrimination as one of the fundamental principles (Art. 7):
"In the asylum procedure in the Republic of Serbia, any discrimination on any grounds shall be prohibited, and in particular on the grounds of race, colour, sex, ethnicity, social origin or a similar status, birth, religion, political or other beliefs, financial standing, culture, language, age, mental, sensory or physical disability."

The Act further proclaims the principle of equality (Art. 14), specifying that asylum seekers have the right to be interviewed by staff or provided with a translator or interpreter of the same sex, unless the enjoyment of this right is impossible to ensure or is associated with disproportionate difficulties for the authority conducting the asylum procedure. However, the principle of gender equality shall always apply during strip and body searches and other actions involving physical contact with the asylum seekers. The Act also lays down that special care shall be extended to persons with special needs (Art. 15):
"In the asylum procedure, account shall be taken of the specific situation of asylum seekers with special needs, such as minors, or persons fully or partially deprived of legal capacity, children separated from their parents or guardians, persons with disabilities, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other grave forms of psychological, physical or sexual violence."

Art. 4 of Protocol No. 4 *(prohibition of the collective expulsion of aliens)*

The Serbian Constitution and laws do not expressly prohibit collective expulsions of aliens. This right, however, is inferred from the following norms:

Under Art. 39(3) of the Constitution, aliens may be expelled from the territory of the Republic of Serbia only pursuant to a decision of the competent authority, rendered in a procedure prescribed by law and subject to appeal, and only to a territory where they do not face the risk of persecution on grounds of their race, sex, religion, ethnicity, citizenship, membership of a social group, political opinion, or grave violations of their rights guaranteed by the Serbian Constitution.

Art. 6 of the Asylum Act also requires the thorough examination of all cases to ensure that the aliens are not expelled to a country where their physical or mental integrity may be at risk. This requires the individualised examination of every case.

Art. 34 (individual applications)

By acceding to the ECHR, the Republic of Serbia recognised the ECtHR's jurisdiction to rule on violations of human rights and freedoms that have occurred under its jurisdiction, thus recognising also the right of any person, group of individuals or non-governmental organisation to submit individual applications to the ECtHR. The Constitution of the Republic of Serbia totally unnecessarily lays down in Art. 22(2) that "[T]he citizens shall have the right to address international institutions in order to protect their freedoms and rights guaranteed by the Constitution."

Art. 39 Rules of Court (interim measures)

As a rule, constitutional appeals do not preclude the implementation of the impugned individual enactments or actions. However, at the request of the appellants, the Constitutional Court may suspend their implementation, provided that such implementation would cause irreparable damage to the appellants and suspension is not contrary to public interest or would not incur significant damage to a third

party (Art. 86 of the Constitutional Court Act[162]). Furthermore, the General Administrative Procedure Act, the provisions of which are applied in the asylum procedure, lays down in Art. 207 that a temporary ruling regulating disputed issues or relationships may be issued if so required by the particular circumstances of the case.

Summary: The three overlapping regimes described above apply simultaneously in all EU Member States and, insofar as other States have opted into to the EU schemes, in some other non-EU States. European states, which are not members of the EU, are not bound by the EU asylum *acquis;* they are only bound by their concurrent obligations under the GC and the ECHR (and other relevant international instruments). Applying these regimes simultaneously is a complex legal exercise. Importantly, Art. 53 of the ECHR ensures that no decision can comply with the ECHR if it gives a lower level of human rights protection than is required by any other international instrument to which the State is a party.

The obligations of national authorities – border guards, asylum determining personnel, judges, legislators: People in need of international protection will encounter State authorities in a number of situations in which the State owes them both substantive and often more importantly procedural duties. State officials and judges will need to be familiar with both the substantive and procedural requirements not only of the applicable national law, but also of the relevant European case law.

[162] Official Gazette of the Republic of Serbia Nos. 109/07, 99/11, 18/13 – Constitutional Court Decision, 103/15, 40/15 - other law.